NO. 82 5119

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

1. Whether the federal bank robbery statute 18 U.S.C. §2113(b) should be construed and interpreted broadly so as to include the crime of fraud by false pretenses for which Petitioner has been convicted?

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NELSON BELL,

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, NELSON BELL, respectfully prays that a writ of certiroari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on June 1, 1982.

OPINION BELOW

The Court of Appeals entered its decision reversing Petitioner's conviction on March 23, 1981. A copy of the opinion is attached as Appendix "A."

The Court granted Respondent's Petition for rehearing and suggestion for rehearing en banc on September 4, 1981. A copy of the order is attached as Appendix "B."

The court entered its decision affirming Petitioner's conviction on June 1, 1982. A copy of the opinion is attached as Appendix "C."

JURISDICTION

On June 1, 1982, the Court of Appeals entered judgment affirming Petitioner's conviction (App C). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> Nor shall any person...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On June 6, 1979, Petitioner was indicted for an alleged violation of 18 U.S.C. §2113(b) in that he allegedly did take and carry away with intent to steal and purloin, certain monies from Dade Federal Savings and Loan Association of Miami the deposits of which were insured by Federal Savings and Loan Insurance Corporation, said money belonging to and in the care, custody, control, management and possession of Dade Federal.

On November 20, 1979, subsequent to a two-day jury trial, the Petitioner was found guilty and was sentenced to one year imprisonment. A copy of the judgment is attached as Appendix "D."

On March 23, 1981, the Court of Appeals reversed the judgment of the District Court. United States v. Bell, 649 F.2d 281 (5th Cir. 1981) (App A). A rehearing en banc was granted and on June 1, 1982, the Court of Appeals affirmed Petitioner's conviction. United States v. Bell, 678 F.2d 547 (11th Cir., former 5th Cir., 1982) App C).

REASON FOR GRANTING THE WRIT

The federal bank robbery statute 18 U.S.C. §2113(b) should be construed and interpreted so as not to include the crime of fraud by false pretenses.

A conflict between the circuits has arisen as to the construction and interpretation of 18 U.S.C. §2113(b) which provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both...

The ambiguity contained in this provision centers around the terms "steal" and "purloin."

The Court below, based upon its decision in Thaggard v. United States 354 F.2d 735 (5th Cir. 1965), cert denied, 383 U.S. 958 (1966), broadly construed the statutes's ambiguous term "steal" as to embrace "all felonious takings...with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." Id. at 737 (quoting United States v. Turley, 352 U.S. 407) Having similarly relied on Turley, the Second Circuit United States v. Fistel, 460 F.2d 157, 162-3 (1972), Seventh Circuit United States v. Guiffre, 576 F.2d 126, 127-8, cert. denied, 439 U.S. 833 (1978), and the Eighth Circuit United States v. Johnson, 575 F.2d 678, 679-80 (1978) have held that a narrow construction of §2113(b) is not warranted. However, none of the above decisions have examined the legislative history of that enactment.

In analyzing the legislative history of 18 U.S.C. §2113(b), the Ninth Circuit in Le Masters v. United States, 378 F.2d 262, 267-8 (1967), not only concluded that a narrow construction was appropriate but also specifically held the crime of false pretenses beyond the statute's reach. In delving into congressional intent the Court stated:

> "...We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions. In 1937, ...Congress enacted §2113 clearly covering robbery and burglary, and including §2113(b), the provisions containing the ambiguous words 'steal' and 'purloin.' In construing the words we are obliged by the Turley case to give them a 'meaning consistent with the context in which (they) appear.' We think that that context, in the light of legislative history, requires that they be construed as not covering the obtaining of money by false pretenses..."

Having similarly relied extensively on the statute's legislative history, the Third Circuit United States v. Pinto, 646 F.2d 833, cert. denied, 102 S.Ct. 94 (1981), the Fourth Circuit United States v. Rogers, 289 F.2d 433 (1961), and the Sixth Circuit United States v. Feroni, 655 F.2d 707(1981) have adopted a narrower construction of §§ 2113(b).

The conflict between the circuits as to the proper construction and interpretation of 13 U.S.C. §2113(b) and the uncertainty created by it require resolution by this Court otherwise there will not be proper notice as to what is proscribed by law in violation of one's Fifth Amendment right of due process.

CONCLUSION

For the foregoing reasons, Petitioner, NELSON BELL, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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DATED: July 23, 1982

UNITED STATES of America, Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals, Fifth Circuit. Unit B

March 23, 1981.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal "Bank Robbery" statute, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that evidence was insufficient to prove that defendant had specific intent to steal at time he took and carried away $10,000 from bank.

Reversed.

Vance, Circuit Judge, dissented and filed opinion.

1. Criminal Law ⇐568

To establish specific intent, Government must prove beyond reasonable doubt that defendant knowingly did act which law forbids purposely intending to violate the law.

2. Criminal Law ⇐552(3)

In circumstantial evidence cases, inferences to be drawn from evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence.

3. Robbery ⇐24.2

Evidence was insufficient to prove that defendant, who possessed check under very suspicious circumstances and deposited it, had specific intent to steal at time he later withdrew amount of cash for which check was written, since jury might have perceived that defendant viewed theft as complete when he acquired check or when he deposited check and had it credited to his account; therefore, evidence was insufficient to support conviction under federal "Bank Robbery" statute. 18 U.S.C.A. § 2113(b).

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and VANCE, Circuit Judges.

TJOFLAT, Circuit Judge:

The appellant, Nelson Bell, was convicted under 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. He appeals his conviction, claiming that, as a matter of law, the evidence was inadequate to support the jury's finding that he took bank money and carried it away with the intent to steal or purloin. We reverse the conviction for insufficient evidence.

I

At the trial of Nelson Bell, the prosecution presented the following evidence. On October 13, 1978, Lawrence Rogovin, in Cincinnati, Ohio, wrote a check for $10,000 on his and his wife's Cincinnati bank account. He made the check payable to himself and his wife and endorsed it "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade

Federal Savings & Loan, Account No. 02-1-1-159976-0." On October 13 or 14, Elaine Rogovin mailed the check to an agent in Dade County, Florida, who was to deposit it in the Rogovins' account at the Dade Federal Savings & Loan (Dade Federal). The agent never received the check.

On October 17, Nelson Bell opened an account at the Alapattah Branch of Dade Federal. He used his own name, but a nonexistent home address and an incorrect date of birth and social security number. Later the same day, he went to another branch of Dade Federal and deposited a check for $10,000 into his new account, giving a second false home address. The check was the same check the Rogovins had mailed except that the account number noted in the endorsement had been scratched out and the defendant's new account number had been written in its place.

Dade Federal accepted the deposit and put a twenty-day hold on the check. Exactly twenty-one days later, on November 7, Bell returned to the Alapattah Branch and withdrew the total amount in the account, with interest, giving a third false home address. He insisted that the bank pay him in cash.

After the $10,000 check was discovered missing, FBI agents visited Nelson Bell at his place of work. Bell signed a written statement admitting that he had deposited the check and later withdrawn the money. He further stated that he received the check in the mail from someone in Cincinnati or Cleveland, Ohio, but that he did not have the letter and could not recall what it said or who sent it. In a subsequent interview, Bell stated that the $10,000 in cash had been stolen from his home in a burglary. A police officer who had investigated a burglary report at his home, however, testified that Bell had failed to report the theft of any money, and another officer testified that Bell specifically told him that no money had been taken and showed him several thousand dollars in a clutch bag.

A grand jury subsequently indicted Bell, charging him with violating 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. The jury found Bell guilty as charged. He appeals, alleging that the evidence was insufficient as a matter of law to sustain his conviction. Specifically, he contends that the government failed to prove that the $10,000 was withdrawn from the bank with the intent to steal or purloin.

II

The Bank Robbery statute, 18 U.S.C. § 2113(b) (1976), provides as follows:

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both ....

In *Thaggard v. United States*, 354 F.2d 735 (1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), this court, relying on *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), interpreted the term "stolen," as used in section 2113(b), to include "all felonious takings ... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Thaggard*, 354 F.2d at 737 (quoting *Turley*, 352 U.S. at 417, 77 S.Ct. at 402). This is not the type of case that

normally arises under this statute. *But see United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). While the facts may indicate that the defendant engaged in wrongdoing of some sort, the question we face is whether they indicate violation of section 2113(b).

There is little question that most of the necessary elements of the offense were met. The parties stipulated that Dade Federal was a federally insured savings and loan. Further, it appears clear that the amount in question exceeds $100 and either belonged to, or was in the care, custody, control, management, or possession of Dade Federal at the time defendant took and carried it away. The defendant contends, however, that the government failed to show that he took the money from Dade Federal with the specific intent to steal or purloin.

To begin, Bell contends that the evidence is insufficient to show that he took the check feloniously from its rightful owner, within the meaning of *Thaggard, supra*. While it is clear that he possessed the check under very suspicious circumstances, the government produced no specific evidence indicating how he got the check. If it cannot be proved that Bell stole the check, initially, it cannot be proved that he subsequently took the funds from the bank with the requisite intent to steal. We seriously question whether the evidence was sufficient on this point, but even assuming that it was, we find the evidence inadequate to prove that Bell had a specific intent to steal at the time he took and carried away the $10,000 from the bank.

[1] In *Prince v. United States*, 230 F.2d 568, 571 (5th Cir. 1956), *reversed on other grounds*, 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957), we specified that 18 U.S.C. § 2113(b) (1976) requires a showing of specific intent. One acts with specific intent when he "knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or to disregard the law ...." *Caples v. United States*, 391 F.2d 1018, 1022 (5th Cir. 1968). "To establish specific intent, the Government must prove beyond a reasonable doubt ... that [the] defendant knowingly did an act which the law forbids purposely intending to violate the law." *United States v. Thaggard*, 477 F.2d 626, 631 (5th Cir.) *cert. denied*, 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973).[1]

By definition, one cannot intend to steal or purloin his own property.[2] Accordingly, if one deposits money with a bank believing that it belongs to him, he has no intent to steal it from the bank when he subsequently takes it back. For example, a defendant may steal cash

1. *See United States v. Bailey*, 444 U.S. 394, 403-07, 100 S.Ct. 624, 631-2, 62 L.Ed.2d 575 (1980) (one acts with specific intent if he consciously desires an illegal result, however likely it is that his conduct will actually cause an illegal result). *See also United States v. Haldeman*, 559 F.2d 31, 114 n. 226 (D.C.Cir.1976), *cert. denied sub nom. Mitchell v. United States*, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States v. Thornton*, 498 F.2d 749, 751 (D.C.Cir.1974); *United States v. Smaldone*, 484 F.2d 311, 321 (10th Cir. 1973) *cert. denied*, 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed.2d 469 (1974); *United States v. Porter*, 431 F.2d 7, 9 (9th Cir.), *cert. denied*, 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970); *United States v. Krosky*, 418 F.2d 65, 67 (6th Cir. 1969); *United States v. Williams*, 332 F.Supp. 1, 3 4 (D.Md. 1971).

2. *See Thaggard*, 354 F.2d at 737. *See also Black's Law Dictionary*, 1267 (5th ed. 1979) (stealing involves taking the property "of another").

from a third party, deposit it with a bank, and later withdraw it. He does not withdraw it with the intent to steal from the bank because he has already stolen the money from the third party; the theft is complete. In withdrawing the cash, the defendant views it as his own, at least vis-a-vis the bank.

If the defendant steals a check from the third party, rather than cash, deposits the check, and later withdraws the amount of cash for which the check was written, the considerations are more complex. For instance, one could view this case as similar to that in the preceding paragraph--the theft is complete when the defendant takes the check, so that in defendant's subsequent dealings with the bank he views the money as his own. On the other hand, one might speculate that the defendant, in invoking the bank processes to convert the check to cash, has an ongoing or new intent to steal the cash the check represents. In the latter case, when does defendant view the crime as complete and thus cease to have the requisite specific intent? When defendant's bank accepts his deposit of the check? When the payor bank honors the check and forwards payment to defendant's bank? When the twenty-day holding period expires, indicating that the defendant now has free use of the amount deposited? In short, the jury in such a case must determine whether the defendant *intended to commit an illegal act by withdrawing the money from the bank.*

[2, 3] In the case at hand, to prove Bell guilty of violating section 2113(b), the government had to prove that he intended to steal the $10,000 through the act of closing out his account with Dade Federal.[3] The only evidence the jury received concerning Bell's specific intent, however, was that he obtained the check under suspicious circumstances; he gave his proper name but a false social security number, date of birth, and address in his dealings with Dade Federal; he transacted his business at two different branches of Dade Federal; his deposit was subject to a twenty-day holding period, and he withdrew the $10,000, in cash, one day after that period expired. This evidence is all circumstantial. "[I]n circumstantial evidence cases the inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence." *United States v. Casey*, 428 F.2d 229, 231 (5th Cir.), *cert. denied*, 400 U.S. 839, 91 S.Ct. 78, 27 L.Ed.2d 73 (1970) (quoting *Montoya v. United States*, 402 F.2d 847, 850 (5th Cir. 1968)). *See United States v. Lange*, 528 F.2d 1280, 1287–8 (5th Cir. 1976); *O'Brien v. United States*, 411 F.2d 522, 524–5 (5th Cir. 1969). Here, even when the evidence is viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), it cannot be said to be inconsistent with every reasonable hypothesis that the defendant lacked the requisite intent to steal or purloin from the bank in withdrawing the $10,000 from his checking account. The jury might have perceived that Bell viewed the theft as complete when he acquired the check and that he

3. In his dissent, Judge Vance relies upon *United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978), in which the Seventh Circuit affirmed the conviction under section 2113(b) of a defendant who deposited stolen, forged checks and later withdrew the money. As Judge Vance acknowledges, however, the Seventh Circuit did not consider the question of specific intent, and there is no indication that the question was raised. Accordingly, we find that case inapposite.

gave false information to the bank only to cover his tracks. It also could have inferred that Bell viewed the theft as complete when he deposited the check and had it credited to his account. In either event Bell would have lacked the requisite specific intent to steal or purloin when he removed the money from his checking account.[4] Accordingly, the conviction must be

REVERSED.

VANCE, Circuit Judge, dissenting:

Through use of a stolen check with an altered endorsement, Bell succeeded in inducing a federally insured savings and loan association to part with possession of ten thousand dollars that did not belong to him. This court in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), upheld a conviction under 18 U.S.C. § 2113(b) of a defendant who withdrew money that he knew his bank had mistakenly credited to his account. I am of the opinion that *Thaggard* is controlling. In *Thaggard*, we expressly rejected the view of the fourth circuit in *United States v. Rogers*, 289 F.2d 433, 437 (4th Cir. 1961), and held that section 2113(b) is not to be so narrowly construed that its applicability is limited only to larceny as that crime was known to the common law. The second and seventh circuits also have adopted this view. *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). These decisions rely on the Supreme Court's interpretation of the word "stolen" in *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957) as a basis for broadly interpreting section 2113(b) to apply to felonious takings with intent to deprive the owner of rights and benefits of ownership. In *Guiffre* the seventh circuit upheld the conviction under section 2113(b) of a defendant who deposited stolen checks with forged endorsements into three separate accounts and later withdrew the money. Although the court did not discuss the requisite intent required for a conviction when a defendant deposits a stolen check with an alteration and later withdraws the money, it affirmed the conviction of a defendant charged by the indictment with "taking and carrying away with the intent to steal." The court did not require testimony concerning the law of negotiable instruments.

The evidence here provided sufficient basis for the jury's conclusion that Bell violated section 2113(b). To my mind Bell's actions in establishing an account with a nonexistent home address and incorrect date of birth and social security number provide ample evidence of specif-

4. In this case the jury needed a framework in which to evaluate Bell's acts and the alternative views he may have held about their ramifications. This framework might have been provided through expert testimony or other evidence and instructions concerning the technicalities of the banking process, debtor-creditor rights, and the law of negotiable instruments. Such matters are foreign to the typical juror, but yet they may be very useful in exploring and evaluating the question of subjective intent. *See United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

Of course, evidence that a defendant's withdrawal injured the bank—for instance, evidence that under state law the bank was liable to the payor of the check for the amount that the defendant withdrew—would not, in itself, be sufficient evidence of specific intent to steal from the bank. Unlike the law of "general intent," which holds simply that one "intends" the "natural consequences of his acts," *Windisch v. United States*, 295 F.2d 531, 532 (5th Cir. 1961), specific intent involves a subjective element. The defendant must actually intend the illegal result. *See Caples*, 391 F.2d at 1022.

649 F.2d 382-3

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals,
Fifth Circuit.
Unit B

Sept. 4, 1981.

Appeal from the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1981, 5 Cir., 1981, 649 F.2d 281).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, Jr., HENDERSON, HATCHETT, ANDERSON and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc *with oral* argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson BELL, Defendant-Appellant.

No. 79-5741.

United States Court of Appeals,
Fifth Circuit.*

Unit B

June 1, 1982.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal bank robbery statute, and he appealed. The Court of Appeals, 649 F.2d 281, reversed by a divided panel. On rehearing en banc, the Court of Appeals, Vance, Circuit Judge, held that evidence that defendant altered the endorsement on a check, deposited it into his account, and thereby was enabled to take and did take a sum of money with intent to steal from the care, custody, control, management or possession of a federally insured savings and loan association was sufficient to sustain his conviction.

Affirmed.

Tjoflat, Circuit Judge, filed dissenting opinion in which Godbold, Chief Judge, and Hatchett and Clark, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, filed specially concurring opinion in which Roney and Clark, Circuit Judges, joined.

1. Robbery ⇐5

Term "steal" as used in federal bank robbery statute embraces all felonious takings with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny. 18 U.S.C.A. § 2113(b).

2. Robbery ⇐5

Federal bank robbery statute could reach conduct which involved taking by means of deceit or false pretenses. 18 U.S.C.A. § 2113(b).

3. Criminal Law ⇐552(3)

In order to be sufficient to support a conviction, it is not necessary that the evidence excludes every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.

4. Robbery ⇐24.1(1)

Evidence that defendant altered the endorsement on a check, deposited it to his account and thereby was enabled to take and did take a sum of money with intent to steal from the care, custody, control, management or possession of a federally insured savings and loan association was sufficient to sustain his conviction under the federal bank robbery statute. 18 U.S.C.A. § 2113(b).

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

VANCE, Circuit Judge:

Nelson Bell was convicted under 18 U.S.C. § 2113(b) and sentenced to imprisonment for one year. He appealed, contending that the evidence was insufficient to support the jury finding that he took or carried away money from a savings and loan association with the intent to steal or purloin. A divided panel of this court re-

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

versed. *United States v. Bell*, 649 F.2d 281 (5th Cir. 1981). Sitting en banc we now affirm Bell's conviction.

On October 13, 1978 Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio to their investment agent in Miami, Florida. The check was made payable to the Rogovins, and had the following limited endorsement on the back: "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings & Loan, Account No. 02-1-159976-0." The agent never received the check.

On October 17 Nelson Bell opened an account at a branch of Dade Federal and was assigned account number 03-1-081526-6. He used his own name, but gave a false address, birth date and social security number. Later that day he deposited the Rogovins' check to account number 03-1-081526-6 at another branch of Dade Federal. The evidence does not show how Bell, who was unknown to the Rogovins, obtained the check. It does show, however, that he was not authorized to deposit or cash the Rogovins' check. At the time of deposit the original account number in the endorsement had been scratched out and Bell's new account number had been added. Dade Federal inexplicably accepted the obviously altered check, guaranteed the endorsement and processed it for payment. After a twenty day holding period the check had cleared. The amount of the deposited check, which had been credited to Bell's account, then became available for withdrawal. On the twenty-first day, before the Rogovins discovered the loss of the check, Bell withdrew the $10,000 in cash and closed the account.

Bell was convicted under the federal bank robbery statute, 18 U.S.C. § 2113(b), which provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

[1, 2] Bell contends that the taking of the $10,000 was not within the statute because it did not constitute common law larceny, a specific intent crime requiring a trespassory taking. The question whether a nontrespassory taking is within the federal statute was treated at some length in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966). We reaffirm this court's conclusion in *Thaggard* that the term "steal," as used in 18 U.S.C. § 2113(b), embraces "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 737 (quoting *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402, 1 L.Ed.2d 430 (1957)).[1]

1. *See United States v. Ferraro*, 414 F.2d 802, 804 (5th Cir. 1969); *Williams v. United States*, 402 F.2d 258, 259 (5th Cir. 1968). The second, seventh and eighth circuits have similarly relied on *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), in deciding that a narrow construction of section 2113(b) is not warranted. *See United States v. Guiffre*, 576 F.2d 126, 127-28 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978); *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *United States v. Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972); *cf. United States v. Maloney*, 607 F.2d 222, 229-30 & n.12 (9th Cir. 1979) (crimes under 18 U.S.C. § 1153 not limited to common law larceny), *cert. denied* 445 U.S. 918, 100 S.Ct. 1280, 63 L.Ed.2d 603 (1980); *United States v. Bryan*, 483 F.2d 88, 91 & n.1 (3d Cir. 1973) (crimes under 18 U.S.C. § 659 not limited to common law larce-

Bell's conduct, which involved taking by means of deceit or false pretenses, can therefore be reached by the federal bank robbery statute.

Bell also argues that the evidence is insufficient to support his conviction unless it excludes every reasonable hypothesis of innocence, on the theory that if there is such a reasonable hypothesis the jury must necessarily have had a reasonable doubt of his guilt. Specifically, he alleges that since the jury could reasonably have found that he believed that his crime was completed before he withdrew the $10,000, the jury must have had a reasonable doubt of his specific intent to steal from Dade Federal. He additionally contends that the proof was insufficient to establish that he altered the endorsement on the Rogovins' check.[2]

[3, 4] We hold that the appellant has incorrectly stated the standard of review for sufficiency of the evidence. It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.[3] A jury is free to choose among reasonable constructions of the evidence. Viewing the evidence presented in this case and the inferences that may be drawn from

ny). *But see United States v. Feroni*, 655 F.2d 707, 709–11 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833, 836–37 (3d Cir.), *cert. denied*, — U.S. ——, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262, 263–68 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437–38 (4th Cir. 1961).

2. Appellant does not dispute that he took and carried away over $100 that belonged to or was in the care, custody, control, management or possession of Dade Federal, which the parties stipulated to be a federally insured savings and loan association.

3. The fifth circuit at one time took the position that the government had a heavier burden of proof when relying on circumstantial evidence of a crime than when relying on direct evidence. Under that view, the district court was required to grant an acquittal unless the circumstantial evidence was "inconsistent with every reasonable hypothesis of innocence." *E.g., Kassin v. United States*, 87 F.2d 183, 184 (5th Cir. 1937). In 1954 the Supreme Court stated that circumstantial evidence was not intrinsically different from testimonial evidence, and described the every reasonable hypothesis jury instruction as "confusing and incorrect." *Holland v. United States*, 348 U.S. 121, 139–40, 75 S.Ct. 127, 137–38, 99 L.Ed. 150 (1954). Despite the Supreme Court's criticism the fifth circuit did not abandon the hypothesis of innocence language, but attempted to reconcile it with *Holland* by rephrasing the test. *See United States v. Squella-Avendano*, 478 F.2d 433, 437 (5th Cir. 1973); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1971); *Riggs v. United States*, 280 F.2d 949, 954–55 (5th Cir. 1960); *Cuthbert v. United States*, 278 F.2d 220, 224–25 (5th Cir. 1960). All of the other circuits have abandoned the hypothesis of innocence phraseology. *See United States v. Davis*, 562 F.2d 681, 689 & n.10 (D.C.Cir.1977); *United States v. Gabriner*, 571 F.2d 48, 50 (1st Cir. 1978); *United States v. Elsbery*, 602 F.2d 1054, 1057 (2d Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979); *United States v. Fiore*, 467 F.2d 86, 88 (2d Cir. 1972), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973); *United States v. Hamilton*, 457 F.2d 95, 98 (3d Cir. 1972); *United States v. Chappell*, 353 F.2d 83, 84 (4th Cir. 1965); *United States v. Conti*, 339 F.2d 10, 12–13 (6th Cir. 1964); *United States v. Wigoda*, 521 F.2d 1221, 1225 (7th Cir. 1975), *cert. denied*, 424 U.S. 949, 96 S.Ct. 1421, 47 L.Ed.2d 355 (1976); *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977); *United States v. Nelson*, 419 F.2d 1237, 1242–45 & nn. 18 & 19 (9th Cir. 1969); *United States v. Merrick*, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023, 93 S.Ct. 462, 34 L.Ed.2d 314 (1972). We conclude that the difference is not merely semantic, and specifically adopt, as the more precise statement of the law, the test as set out in the text above.

it in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that it was sufficient to allow a reasonable jury to find that Bell altered the endorsement on the check, deposited it to his account, and thereby was enabled to take and did take $10,000 with intent to steal from the care, custody, control, management or possession of Dade Federal.

AFFIRMED.

TJOFLAT, Circuit Judge, joined by GODBOLD, Chief Judge, HATCHETT and THOMAS A. CLARK, Circuit Judges, dissenting:

There is little question that Nelson Bell engaged in some form of criminal activity: Bell wrongfully obtained $10,000 that belonged to another. The issue, however, is not whether Bell committed a crime, but whether his conduct was proscribed by the federal bank robbery statute, 18 U.S.C. § 2113(b) (1976). Because I believe that it was not, I respectfully dissent.

The majority asserts that Bell's presentation of the altered check to Dade Federal for credit to his account and his subsequent withdrawal of the funds represented by that check amounted to the crime of fraud by false pretenses and that this activity violated section 2113(b). Assuming, *arguendo*, that Bell committed fraud by false pretenses,[1] I take issue with the majority over whether the federal bank robbery statute should be interpreted to proscribe that crime.

That statute provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. ...

18 U.S.C. § 2113(b) (1976).

There can be no doubt that this provision is ambiguous. "[T]hroughout our jurisprudence, the courts have considered that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. McClain*, 545 F.2d

1. Although the majority finds, and my analysis assumes, sufficient evidence that Bell committed fraud by false pretenses against Dade Federal, I have serious doubts whether this is actually the case. The elements of common law false pretenses are a false representation of fact, scienter, intent to induce action in reliance on the misrepresentation, justifiable reliance by the party fraudulently induced, and *loss* to that party resulting from such reliance. *Prosser, Law of Torts*, § 105 at 685–86 (4th ed. 1972); *see generally Torcia, Wharton's Criminal Law*, §§ 422–452 (14th ed. 1980). There is no evidence in this case that Dade Federal suffered any loss as a result of Bell's activities. The evidence showed that Bell presented the altered check to Dade Federal for deposit to his account. Dade Federal did not immediately credit Bell's account however, instead it waited until the check had been paid by the drawee bank in Cincinnati. According to the evidence then, when Bell withdrew the $10,000 from his Dade Federal account he in essence withdrew funds that had been provided Dade Federal by the Cincinnati bank. There was no proof that Dade Federal was ever called upon by the Cincinnati bank to absorb that bank's loss, or that of the maker, and the trial judge's instructions did not speak to that issue. Therefore, we have a case in which the government failed to prove that the alleged victim of fraud by false pretenses, Dade Federal, suffered any loss.

The government's proof established nothing more than that Dade Federal was a conduit through which Bell was enabled to appropriate the funds of another. Therefore, even if § 2113(b) could be read to prohibit fraud by false pretenses, the evidence presented in this case was insufficient to convict Bell.

988, 995 (5th Cir. 1977), *quoting Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals." *United States v. Boston and Maine R.R.*, 380 U.S. 157, 160, 85 S.Ct. 868, 870, 13 L.Ed.2d 728 (1965), *quoting United States v. Wiltberger*, 5 Wheat. (18 U.S.) 76, 5 L.Ed. 37 (1820). "Of course, the doctrine of strict construction is not absolute. '[T]he intention of the law-maker must govern in the construction of penal ... statutes.'" *McClain*, 545 F.2d at 996 (citations omitted).

Applying these principles, the Court of Appeals for the Ninth Circuit analyzed the legislative history of section 2113(b), and not only concluded that a narrow construction of that provision was appropriate, but also specifically held the crime of false pretenses beyond the statute's reach. *LeMasters v. United States*, 378 F.2d 262, 267–68 (9th Cir. 1967). I can do no better than recite the Ninth Circuit's painstaking parsing of congressional intent:

> The 1937 enactment of 18 U.S.Code § 2113(b) had a background and legislative history wholly different from those of the 1919 stolen motor vehicle act. *We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions.* In 1937, without any further discussion of evil to be cured, Congress enacted § 2113 clearly covering robbery and burglary, and including § 2113(b), the provision containing the ambiguous words "steal" and "purloin." In construing the words we are obliged by the Turley case to give them a "meaning consistent with the context in which [they] appear." *We think that that context, in the light of legislative history, requires that they be construed as not covering the obtaining of money by false pretenses.* The words are used in conjunction with the words "takes and carries away," and these are the classic words used to define larceny. The words do not have a necessary common law meaning; rather, they are ambiguous. They are used in a statute, the purpose of which, as stated in its title, is "* * * to include larceny." In such a case, the title is "a useful aid in resolving ambiguilty [sic]. ..."
>
> In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. *Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank of [sic] federal crime, that such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law.* None of the reasons which persuaded the circuits and finally the Supreme Court to interpret broadly the word stolen in the motor vehicle act were present in 1937, when Congress wrote § 2113, or are present today.

If the oft cited canon of statutory construction that ambiguities in penal statutes are to be resolved in favor of the accused has any vitality, this is a plain case for its application.

Id. (citations omitted) (emphasis supplied). *See Jerome v. United States*, 318 U.S. 101, 105–6, 63 S.Ct. 483, 486, 87 L.Ed. 640 (1943); *United States v. Feroni*, 655 F.2d 707, 710–711 (6th Cir. 1981).

I find this analysis of congressional intent very persuasive. The resolution of the ambiguity which section 2113(b) manifests is significantly aided by the legislative history which shows that Congress expressly considered, but rejected, the inclusion of fraud by false pretenses within the statute's purview.[2] I am also cognizant of the precept of strict construction of criminal statutes and of the Supreme Court's directive that federal courts "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. at 104, 63 S.Ct. at 485 (interpreting earlier version of federal bank robbery statute). Given all of this, I would hold that section 2113(b) does not encompass conduct which amounts only to fraud by false pretenses. *Accord, United States v. Feroni*, 655 F.2d 707 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967).

I disagree with the majority that *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), controls this case. In *Thaggard*, the defendant drew money from his bank account when he knew that the bank had mistakenly overcredited that account. Thus, the common law equivalent of Thaggard's activity was more in the nature of *conversion*, rather than false pretenses. Moreover, the bank in *Thaggard*, unlike Dade Federal in this case, suffered a tangible loss. See note 1, *supra*. Finally, the majority's reading of *Thaggard* as holding that section 2113(b) embraces "all felonious takings" is erroneous: that language in *Thaggard* is plainly dicta, not at all necessary to the result. The majority's use of *Thaggard* to extend section 2113(b)'s reach to include fraud by false pretenses is, therefore, misguided, especially in light of the legislative history and rules of construction I have discussed.

I have no quarrel with the majority's adoption of a test for sufficiency of the evidence which inquires whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." Majority opinion at slip op. p. 15227, pp. ———. The application of this test does not change my analysis of this case or the conclusions I have reached, however, for even if there were overwhelming evidence that Bell subjected Dade Federal to the crime of fraud by false

2. Notably, none of the decisions which "broadly construe[] § 2113(b) [see majority opinion, note 1, *supra*] examines the legislative history of that enactment. Each of those decisions is nothing more than a mechanical application of [*United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957)]. They provide no discussion of why the context of § 2113(b) suggests that a broad interpretation of its provisions is appropriate." *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981). Conversely, the courts that have adopted a narrower construction of § 2113(b) have relied extensively on the statute's legislative history. *See Feroni, supra; United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, — U.S. —, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437–38 (4th Cir. 1961).

pretenses, I would nevertheless hold that a section 2113(b) prosecution could not lie.

I respectfully dissent.

R. LANIER ANDERSON, III, Circuit Judge, joined by RONEY and THOMAS A. CLARK, Circuit Judges, specially concurring:

I concur in the opinion, and I write separately only to state my understanding that Judge Vance's opinion does not change the substantive law of this circuit with respect to the standard of review for sufficiency of the evidence. To say that the evidence is sufficient if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt," *supra* Slip op. at 15227, at ——, is not substantively different from saying that the evidence is sufficient if a reasonable trier of fact could find that the "evidence was inconsistent with every reasonable hypothesis of innocence." *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981). It is true that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt," *supra* Slip op. at 15227, at ——, but it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt.

United States of America vs.

DEFENDANT: NELSON BELL

MICROFILMED

DEC 20 1979

JOSEPH P. BOGART
CLERK, U.S. DIST. CT.

United States District Court

THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 79-220-CR-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (6

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: December DAY: 18 YE: 197

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Frederico A. Moreno, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual bas's for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of taking and stealing certain monie from Dade Federal Savings and Loan Association of Miami; in violatic of Title 18, USC, Section 2113(b); as charged in the One Count Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the con was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defend hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1 YEAR, or until otherwise discharged by due process of law.

FILED

DEC 18 1979

JAMES L. KNIGHT
CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out o reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, a any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and re probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,-

It is ordered that the Clerk deli a certified copy of this judgm and commitment to the U.S. M shal or other qualified officer.

104

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

SIDNEY M. ARONOVITZ

Date December 18, 1979

"Appendix D"

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO._____

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

STATE OF FLORIDA)
COUNTY OF BROWARD) SS

ROY W. ALLMAN, after being duly sworn, deposes and says that pursuant to Rule 28.4 (a) of this Court he served the within MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

and depositing same in the United States Mails at Fort Lauderdale, Florida, on 23rd day of July, 1982.

ROY W. ALLMAN, Affiant

SUBSCRIBED AND SWORN to before me this 23d day of July, 1982.

Notary Public

NOTARY PUBLIC
STATE OF FLORIDA
MY COMMISSION EXPIRES
APRIL 15 1985
BONDED THRU GEN. INS. UND.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5119

NELSON BELL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.
_____/

MOTION FOR APPOINTMENT OF COUNSEL

COMES NOW, ROY W. ALLMAN, Attorney for Petitioner, pursuant to Supreme Court Rule 46 and moves this Honorable Court to appoint him as counsel for Petitioner and in support thereof would state the following:

1. The motion of Petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari were granted Novmeber 29, 1982.

2. Applicant has represented Petitioner in the Court of Appeals below and, as a result is extremely familiar with Petitioner's case.

3. Petitioner has expressed a strong desire that applicant continue to represent him in the proceedings before this Honorable Court and applicant so desires to continue said representation.

4. Applicant is a sole practitioner who has graduated from Cumberland School of Law, Samford University, 1970.

5. Applicant has been an active, practicing attorney in the State of Florida for the past twelve (12) years and is a member in good standing of the Florida Bar.

6. Applicant has been admitted to practice before all State Courts of Florida and all Federal Courts, including the United States Supreme Court.

7. Applicant has actually appeared before the following courts:

(a) State Trial courts;

(b) Courts of Appeals (3rd and 4th Circuits); and

(c) Federal District Trial Courts.

8. Applicant's experience with Appellate practice includes:

(a) Presented three (3) oral arguments;

(b) Had written four (4) or five (5) appellate briefs; and

(c) Supervised other attorneys.

WHEREFORE, the Applicant, ROY W. ALLMAN, respectfully requests that this Honorable Court appoint him Counsel for Petitioner.

I HEREBY CERTIFY that a copy of the foregoing has been mailed this 27th day of December, 1982, to: REX E. LEE, Solicitor General, Department of Justice, Washington, D.C. 20503.

LAW OFFICE OR ROY W. ALLMAN, P.A.
208 S. E. Sixth Street
Fort Lauderdale, FL 33301
(305) 467-9669

Roy W Allman (me)
ROY W. ALLMAN
Attorney for Petitioner

No. 82-5119

In the Supreme Court of the United States

OCTOBER TERM, 1982

NELSON BELL, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNIT B

JOINT APPENDIX

ROY W. ALLMAN
Roy W. Allman, P.A.
208 S. E. Sixth Street
Fort Lauderdale, FL 33301
(305) 467-9669
Counsel for Petitioner

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

PETITION FOR CERTIORARI FILED JULY 2, 1982.
CERTIORARI GRANTED NOVEMBER 29, 1982.

INDEX

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 79-00220-CR-SMA-1

6/6/79	INDICTMENT RETURNED AT MIAMI, FLORIDA
6/12/79	*Appearance Bond* in amt. of $10,000 personal surety; deft. address: 2146 N.W. 61 Street, Miami, Fla. (6/8/79-PRP)
11/19/79	Jury trial commenced
11/20/79	Jury trial resumed and concluded
11/20/79	JURY VERDICT: Jury finds Deft. Guilty to Ct. 1 M-11-20-79
11/20/79	Court adjudges Deft. Guilty; Bond to remain the same amt. except mother is to add mortgage to recog. bond; PSI
12/18/79	J & C: Impr. 1 yr. (12/18/79-SMA) M - 12/19/79
12/20/79	*Notice of Appeal* filed by deft. from the Final Judgment entered 12/18/79 (copies to USCA, US Atty, ct. reporter, probation, and defendant)
1/4/80	Bond on Appeal in the amount of $10,000 posted on 1-4-79 [sic] with surety of a Mortgage Deed on her property at 2146 N.W. 61 St., Miami, Fla (Mortgage Deed - In Vault) Approved by Judge Aronovitz
1/4/80	ORDER: Deft's Motion for Appeal Bond is GRANTED. A Spec. Cond. of the deft's release is that Rosa Lee Bell is to file, as surety, a Mortgage Deed of her home at 2146 N.W. 61st Street, Miami 33142. This spec. cond. is in addition to the conditions of release previously signed by deft. (1-4-80-SMA) M-1-9-80

FIFTH CIRCUIT COURT OF APPEALS
UNIT B

RELEVANT DOCKET ENTRIES

3/28/81	Opinion Rendered; reversed
9/4/81	Order on Petition for Rehearing En Banc; Filing Order that case be reheard En Banc w/oral argument before all reg. active Unit B Judges.
1/18/82	Case argued by Appellant and by Appellee.
6/1/82	Opinion Rendered; affirmed
8/2/82	Notice of flg of Cert Pet. on 7/16/82; Flg ORDER OF SC: the Mandate of the U.S. CA f/11th Circuit is hereby RECALLED AND STAYED pending disposition by this Court of petition f/a writ of Certiorari. Should the petition f/a writ of certiorari be denied, this stay is to terminate automatically. In the event that the petition f/cert is granted, this stay shall continue in effect pending the sending down of the judgment of this Court. (Powell).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 79-220-CR-SMA
18 USC 2113(b)
M/S $5,000 - 10 years

UNITED STATES OF AMERICA

v.

NELSON BELL

INDICTMENT

The Grand Jury charges that:

On or about November 7, 1978, at Miami, Dade County, in the Southern District of Florida, the defendant,

NELSON BELL,

did take and carry away, with intent to steal and purloin certain monies from Dade Federal Savings and Loan Association of Miami, the deposits of which were then insured by the Federal Savings and Loan Insurance Corporation, certificate number 61, issued October 27, 1934, the sum of said money being in the amount of $10,000, belonging to and in the care, custody, control, management and possession of the said Federal Savings and Loan Association; in violation of Title 18, United States Code, Section 2113(b).

A TRUE BILL

_____
FOREPERSON

/s/ J.V. ESKENAZI
J.V. ESKENAZI
UNITED STATES ATTORNEY

/s/ RALPH N. PERSON
RALPH N. PERSON
ASSISTANT UNITED STATES ATTORNEY

ted States of America vs.

United States District Court for

FENDANT NELSON BELL

THE SOUTHERN DISTRICT OF FLORIDA

DOCKET NO. 79-220-CR-SMA

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: December DAY: 18 YEAR: 1979

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Frederico A. Moreno, Esq.
(Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

INDING & UDGMENT

There being a ~~finding~~/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of taking and stealing certain monies from Dade Federal Savings and Loan Association of Miami; in violation of Title 18, USC, Section 2113(b); as charged in the One Count Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR, or until otherwise discharged by due process of law.

SPECIAL CONDITIONS OF PROBATION

FILED

DEC 18 1979

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI, FLORIDA

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

SIDNEY M. ARONOVITZ

Date December 18, 1979

CERTIFIED AS A TRUE COPY ON

THIS DATE 12-18-79

BY Susan Key
(By) CLERK
Deputy

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 79-220-Cr-SMA

UNITED STATES OF AMERICA

v.

NELSON BELL

NOTICE OF APPEAL

Notice is hereby given that Nelson Bell, defendant above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on the 18th day of December, 1979.

Dated: December 18, 1979

THEODORE J. SAKOWITZ
Federal Public Defender

By: /s/ FEDERICO A. MORENO

FEDERICO A. MORENO
Ass't Federal Public Defender
Attorney for Defendant
505 Ainsley Building
Miami, Florida 33132

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT B

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

NELSON BELL, DEFENDANT-APPELLANT.

No. 79-5741.

March 23, 1981.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal "Bank Robbery" statute, and he appealed. The Court of Appeals, Tjoflat, Circuit Judge, held that evidence was insufficient to prove that defendant had specific intent to steal at time he took and carried away $10,000 from bank.

Reversed.

Vance, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, TJOFLAT and VANCE, Circuit Judges.

TJOFLAT, Circuit Judge:

The appellant, Nelson Bell, was convicted under 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. He appeals his conviction, claiming that, as a matter of law, the evidence was inadequate to support the jury's finding that he took bank money and carried it away with the intent to steal or purloin. We reverse the conviction for insufficient evidence.

I

At the trial of Nelson Bell, the prosecution presented the following evidence. On October 13, 1978, Lawrence Rogovin, in Cincinnati, Ohio, wrote a check for $10,000 on his and his wife's Cincinnati bank account. He made the check

payable to himself and his wife and endorsed it "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings & Loan, Account No. 02-1-1-159976-0." On October 13 or 14, Elaine Rogovin mailed the check to an agent in Dade County, Florida, who was to deposit it in the Rogovins' account at the Dade Federal Savings & Loan (Dade Federal). The agent never received the check.

On October 17, Nelson Bell opened an account at the Alapattah Branch of Dade Federal. He used his own name, but a nonexistent home address and an incorrect date of birth and social security number. Later the same day, he went to another branch of Dade Federal and deposited a check for $10,000 into his new account, giving a second false home address. The check was the same check the Rogovins had mailed except that the account number noted in the endorsement had been scratched out and the defendant's new account number had been written in its place.

Dade Federal accepted the deposit and put a twenty-day hold on the check. Exactly twenty-one days later, on November 7, Bell returned to the Alapattah Branch and withdrew the total amount in the account, with interest, giving a third false home address. He insisted that the bank pay him in cash.

After the $10,000 check was discovered missing, FBI agents visited Nelson Bell at his place of work. Bell signed a written statement admitting that he had deposited the check and later withdrawn the money. He further stated that he received the check in the mail from someone in Cincinnati or Cleveland, Ohio, but that he did not have the letter and could not recall what it said or who sent it. In a subsequent interview, Bell stated that the $10,000 in cash had been stolen from his home in a burglary. A police officer who had investigated a burglary report at his home, however, testified that Bell had failed to report the theft of any money, and another officer testified that Bell specifically told him that no money had been taken and showed him several thousand dollars in a clutch bag.

A grand jury subsequently indicted Bell, charging him with violating 18 U.S.C. § 2113(b) (1976), the federal "Bank Robbery" statute. The jury found Bell guilty as charged. He appeals, alleging that the evidence was insuffi-

cient as a matter of law to sustain his conviction. Specifically, he contends that the government failed to prove that the $10,000 was withdrawn from the bank with the intent to steal or purloin.

II

The Bank Robberty statute, 18 U.S.C. § 2113(b) (1976), provides as follows:

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both . . . .

In *Thaggard v. United States*, 354 F.2d 735 (1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), this court, relying on *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), interpreted the term "stolen," as used in section 2113(b), to include "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Thaggard*, 354 F.2d at 737 (quoting *Turley*, 352 U.S. at 417, 77 S.Ct. at 402). This is not the type of case that normally arises under this statute. *But see United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). While the facts may indicate that the defendant engaged in wrongdoing of some sort, the question we face is whether they indicate violation of section 2113(b).

There is little question that most of the necessary elements of the offense were met. The parties stipulated that Dade Federal was a federally insured savings and loan. Further, it appears clear that the amount in question exceeds $100 and either belonged to, or was in the care, custody, control, management, or possession of Dade Federal at the time defendant took and carried it away. The defendant contends, however, that the government failed to show that he took the money from Dade Federal with the specific intent to steal or purloin.

To begin, Bell contends that the evidence is insufficient to show that he took the check feloniously from its rightful owner, within the meaning of *Thaggard, supra.* While it is clear that he possessed the check under very suspicious circumstances, the government produced no specific evidence indicating how he got the check. If it cannot be proved that Bell stole the check, initially, it cannot be proved that he subsequently took the funds from the bank with the requisite intent to steal. We seriously question whether the evidence was sufficient on this point, but even assuming that it was, we find the evidence inadequate to prove that Bell had a specific intent to steal at the time he took and carried away the $10,000 from the bank.

In *Prince v. United States,* 230 F.2d 568, 571 (5th Cir. 1956), *reversed on other grounds,* 352 U.S. 322, 77 S.Ct. 403, 1 L.Ed.2d 370 (1957), we specified that 18 U.S.C. § 2113(b) (1976) requires a showing of specific intent. One acts with specific intent when he "knowingly does an act which the law forbids or knowingly fails to do an act which the law requires to be done, intending with bad purpose either to disobey or to disregard the law . . . ." *Caples v. United States,* 391 F.2d 1018, 1022 (5th Cir. 1968). "To establish specific intent, the Government must prove beyond a reasonable doubt . . . that [the] defendant knowingly did an act which the law forbids purposely intending to violate the law." *United States v. Thaggard,* 477 F.2d 626, 631 (5th Cir.) *cert. denied,* 414 U.S. 1064, 94 S.Ct. 570, 38 L.Ed.2d 469 (1973).[1]

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[1] *See United States v. Bailey,* 444 U.S. 394, 403-07, 100 S.Ct. 624, 631-2, 62 L.Ed.2d 575 (1980) (one acts with specific intent if he consciously desires an illegal result, however likely it is that his conduct will actually cause an illegal result). *See also United States v. Haldeman,* 559 F.2d 31, 114 n. 226 (D.C.Cir. 1976), *cert. denied sub nom. Mitchell v. United States,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States v. Thornton,* 498 F.2d 749, 751 (D.C.Cir.1974); *United States v. Smaldone,* 484 F.2d 311, 321 (10th Cir. 1973) *cert. denied,* 415 U.S. 915, 94 S.Ct. 1411, 39 L.Ed.2d 469 (1974); *United States v. Porter,* 431 F.2d 7, 9 (9th Cir.), *cert. denied,* 400 U.S. 960, 91 S.Ct. 360, 27 L.Ed.2d 269 (1970); *United States v. Krosky,* 418 F.2d 65, 67 (6th Cir. 1969); *United States v. Williams,* 332 F.Supp. 1, 3-4 (D.Md. 1971).

By definition, one cannot intend to steal or purloin his own property.[2] Accordingly, if one deposits money with a bank believing that it belongs to him, he has no intent to steal it from the bank when he subsequently takes it back. For example, a defendant may steal cash from a third party, deposit it with a bank, and later withdraw it. He does not withdraw it with the intent to steal from the bank because he has already stolen the money from the third party; the theft is complete. In withdrawing the cash, the defendant views it as his own, at least vis-a-vis the bank.

If the defendant steals a check from the third party, rather than cash, deposits the check, and later withdraws the amount of cash for which the check was written, the considerations are more complex. For instance, one could view this case as similar to that in the preceding paragraph—the theft is complete when the defendant takes the check, so that in defendant's subsequent dealings with the bank he views the money as his own. On the other hand, one might speculate that the defendant, in invoking the bank processes to convert the check to cash, has an ongoing or new intent to steal the cash the check represents. In the latter case, when does defendant view the crime as complete and thus cease to have the requisite specific intent? When defendant's bank accepts his deposit of the check? When the payor bank honors the check and forwards payment to defendant's bank? When the twenty-day holding period expires, indicating that the defendant now has free use of the amount deposited? In short, the jury in such a case must determine whether the defendant *intended to commit an illegal act by withdrawing the money from the bank.*

In the case at hand, to prove Bell guilty of violating section 2113(b), the government had to prove that he intended to steal the $10,000 through the act of closing out his

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[2] *See Thaggard*, 354 F.2d at 737. *See also Black's Law Dictionary*, 1267 (5th ed. 1979) (stealing involves taking the property "of another").

account with Dade Federal.[3] The only evidence the jury received concerning Bell's specific intent, however, was that he obtained the check under suspicious circumstances; he gave his proper name but a false social security number, date of birth, and address in his dealings with Dade Federal; he transacted his business at two different branches of Dade Federal; his deposit was subject to a twenty-day holding period, and he withdrew the $10,000, in cash, one day after that period expired. This evidence is all circumstantial. "[I]n circumstantial evidence cases the inferences to be drawn from the evidence must not only be consistent with guilt but inconsistent with every reasonable hypothesis of innocence." *United States v. Casey*, 428 F.2d 229, 231 (5th Cir.), *cert. denied*, 400 U.S. 839, 91 S.Ct. 78, 27 L.Ed.2d 73 (1970) (quoting *Montoya v. United States*, 402 F.2d 847, 850 (5th Cir. 1968)). *See United States v. Lange*, 528 F.2d 1280, 1287-8 (5th Cir. 1976); *O'Brien v. United States*, 411 F.2d 522, 524-5 (5th Cir. 1969). Here, even when the evidence is viewed in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), it cannot be said to be inconsistent with every reasonable hypothesis that the defendant lacked the requisite intent to steal or purloin from the bank in withdrawing the $10,000 from his checking account. The jury might have perceived that Bell viewed the theft as complete when he acquired the check and that he gave false information to the bank only to cover his tracks. It also could have inferred that Bell viewed the theft as complete when he deposited the check and had it credited to his account. In either event Bell would have lacked the requisite specific intent to steal or purloin when

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[3] In his dissent, Judge Vance relies upon *United States v. Guiffre*, 576 F.2d 126 (7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978), in which the Seventh Circuit affirmed the conviction under section 2113(b) of a defendant who deposited stolen, forged checks and later withdrew the money. As Judge Vance acknowledges, however, the Seventh Circuit did not consider the question of specific intent, and there is no indication that the question was raised. Accordingly, we find that case inapposite.

he removed the money from his checking account.[4] Accordingly, the conviction must be

REVERSED.

VANCE, Circuit Judge, dissenting:

Through use of a stolen check with an altered endorsement, Bell succeeded in inducing a federally insured savings and loan association to part with possession of ten thousand dollars that did not belong to him. This court in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), upheld a conviction under 18 U.S.C. § 2113(b) of a defendant who withdrew money that he knew his bank had mistakenly credited to his account. I am of the opinion that *Thaggard* is controlling. In *Thaggard*, we expressly rejected the view of the fourth circuit in *United States v. Rogers*, 289 F.2d 433, 437 (4th Cir. 1961), and held that section 2113(b) is not to be so narrowly construed that its applicability is limited only to larceny as that crime was known to the common law. The second and seventh circuits also have adopted this view. *United States v. Fistel*, 460 F.2d 157, 162 (2d Cir. 1972); *United States v. Guiffre*, 756 F.2d 126

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[4] In this case the jury needed a framework in which to evaluate Bell's acts and the alternative views he may have held about their ramifications. This framework might have been provided through expert testimony or other evidence and instructions concerning the technicalities of the banking process, debtor-creditor rights, and the law of negotiable instruments. Such matters are foreign to the typical juror, but yet they may be very useful in exploring and evaluating the question of subjective intent. *See United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (en banc).

Of course, evidence that a defendant's withdrawal injured the bank—for instance, evidence that under state law the bank was liable to the payor of the check for the amount that the defendant withdrew—would not, in itself, be sufficient evidence of specific intent to steal from the bank. Unlike the law of "general intent," which holds simply that one "intends" the "natural consequence of his acts," *Windisch v. United States*, 295 F.2d 531, 532 (5th Cir. 1961), specific intent involves a subjective element. The defendant must actually intend the illegal result. *See Caples*, 391 F.2d at 1022.

(7th Cir.), *cert. denied*, 439 U.S. 833, 99 S.Ct. 113, 58 L.Ed.2d 128 (1978). These decisions rely on the Supreme Court's interpretation of the word "stolen" in *United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957) as a basis for broadly interpreting section 2113(b) to apply to felonious takings with intent to deprive the owner of rights and benefits of ownership. In *Guiffre* the seventh circuit upheld the conviction under section 2113(b) of a defendant who deposited stolen checks with forged endorsements into three separate accounts and later withdrew the money. Although the court did not discuss the requisite intent required for a conviction when a defendant deposits a stolen check with an alteration and later withdraws the money, it affirmed the conviction of a defendant charged by the indictment with "taking and carrying away with the intent to steal." The court did not require testimony concerning the law of negotiable instruments.

The evidence here provided sufficient basis for the jury's conclusion that Bell violated section 2113(b). To my mind Bell's actions in establishing an account with a nonexistent home address and incorrect date of birth and social security number provide ample evidence of specific intent. Appellate review of the sufficiency of the evidence to support appellant's conviction requires that the evidence by viewed in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *United States V. Black*, 497 F.2d 1039 (5th Cir. 1974). This court has ruled that "[a]ll reasonable inferences and credibility choices as will support the jury's verdict of guilty must be made." *Id.* at 1401. When measured against this standard, the evidence before us requires that Bell's conviction be affirmed.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.
UNIT B

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

NELSON BELL, DEFENDANT-APPELLANT.

No. 79-5741.

Sept. 4, 1981.

Appeal from the United States District Court for the Southern District of Florida, Sidney M. Aronovitz, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion March 23, 1981, 5 Cir., 1981, 649 F.2d 281).

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, FRANK M. JOHNSON, JR., HENDERSON, HATCHETT, ANDERSON and THOMAS A. CLARK, Circuit Judges.

BY THE COURT:

A member of this Administrative Unit of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in this Administrative Unit in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by this Administrative Unit of the Court en banc *with oral* argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT*
UNIT B

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

NELSON BELL, DEFENDANT-APPELLANT.

No. 79-5741

June 1, 1982.

Defendant was convicted in the United States District Court for the Southern District of Florida, at Miami, Sidney M. Aronovitz, J., under the federal bank robbery statute, and he appealed. The Court of Appeals, 649 F.2d 281, reversed by a divided panel. On rehearing en banc, the Court of Appeals, Vance, Circuit Judge, held that evidence that defendant altered the endorsement on a check, deposited it into his account, and thereby was enabled to take and did take a sum of money with intent to steal from the care, custody, control, management or possession of a federally insured savings and loan association was sufficient to sustain his conviction.

Affirmed.

Tjoflat, Circuit Judge, filed dissenting opinion in which Godbold, Chief Judge, and Hatchett and Clark, Circuit Judges, joined.

R. Lanier Anderson, III, Circuit Judge, filed specially concurring opinion in which Roney and Clark, Circuit Judges, joined.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.

VANCE, Circuit Judge:

Nelson Bell was convicted under 18 U.S.C. § 2113(b) and sentenced to imprisonment for one year. He appealed, contending that the evidence was insufficient to support the jury finding that he took or carried away money from a savings and loan association with the intent to steal or purloin. A divided panel of this court reversed. *United States v. Bell*, 649 F.2d 281 (5th Cir. 1981). Sitting en banc we now affirm Bell's conviction.

On October 13, 1978 Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio to their investment agent in Miami, Florida. The check was made payable to the Rogovins, and had the following limited endorsement on the back: "Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings & Loan, Account No. 02-1-159976-0." The agent never received the check.

On October 17 Nelson Bell opened an account at a branch of Dade Federal and was assigned account number 03-1-081526-6. He used his own name, but gave a false address, birth date and social security number. Later that day he deposited the Rogovins' check to account number 03-1-081526-6 at another branch of Dade Federal. The evidence does not show how Bell, who was unknown to the Rogovins, obtained the check. It does show, however, that he was not authorized to deposit or cash the Rogovins' check. At the time of deposit the original account number in the endorsement had been scratched out and Bell's new account number had been added. Dade Federal inexplicably accepted the ob-

viously altered check, guaranteed the endorsement and processed it for payment. After a twenty day holding period the check had cleared. The amount of the deposited check, which had been credited to Bell's account, then became available for withdrawal. On the twenty-first day, before the Rogovins discovered the loss of the check, Bell withdrew the $10,000 in cash and closed the account.

Bell was convicted under the federal bank robbery statute, 18 U.S.C. § 2113(b), which provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. ...

Bell contends that the taking of the $10,000 was not within the statute because it did not constitute common law larceny, a specific intent crime requiring a trespassory taking. The question whether a nontrespassory taking is within the federal statute was treated at some length in *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966). We reaffirm this court's conclusion in *Thaggard* that the term "steal," as used in 18 U.S.C. § 2113(b), embraces "all felonious takings ... with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny." *Id.* at 737 (quoting *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402, 1 L.Ed.2d 430 (1957))[1] Bell's conduct, which

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[1] *See United States* v. *Ferraro*, 414 F.2d 802, 804 (5th Cir. 1969); *Williams* v. *United States*, 402 F.2d 258, 259 (5th Cir. 1968). The second seventh and eighth circuits have similarly relied on *United States* v. *Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957), in deciding that a narrow construction of section 2113(b) is not warranted. *See United States v. Guiffre*, 576 F.2d 126, 127-28 (7th Cir.), *cert. denied*,

involved taking by means of deceit or false pretenses, can therefore be reached by the federal bank robbery statute.

Bell also argues that the evidence is insufficient to support his conviction unless it excludes every reasonable hypothesis of innocence, on the theory that if there is such a reasonable hypothesis the jury must necessarily have had a reasonable doubt of his guilt. Specifically, he alleges that since the jury could reasonably have found that he believed that his crime was completed before he withdrew the $10,000, the jury must have had a reasonable doubt of his specific intent to steal from Dade Federal. He additionally contends that the proof was insufficient to establish that he altered the endorsement on the Rogovins' check.[2]

We hold that the appellant has incorrectly stated the standard of review for sufficiency of the evidence. It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.[3] A jury is

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439 U.S. 833, 99 S.Ct. 113, 58 L.Ed. 128 (1978); *United States v. Johnson*, 575 F.2d 678, 679-80 (8th Cir. 1978); *United States* v. *Fistel*, 460 F.2d 157, 162-63 (2d Cir. 1972); *cf. United States v. Maloney*, 607 F.2d 222, 229-30 & n.12 (9th Cir. 1979) (crimes under 18 U.S.C. § 1153 not limited to common law larceny), *cert. denied*, 445 U.S. 918, 100 S.Ct. 1280, 63 L.Ed.2d 603 (1980); *United States v. Bryan*, 483 F.2d 88, 91 & n.1 (3d Cir. 1973) (crimes under 18 U.S.C. § 659 not limited to common law larceny). *But see United States* v. *Feroni*, 655 F.2d 707, 709-11 (6th Cir. 1981); *United States* v. *Pinto*, 646 F.2d 833, 836-37 (3d Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262, 263-68 (9th Cir. 1967); *United States* v. *Rogers*, 289 F.2d 433, 437-38 (4th Cir. 1961).

[2] Appellant does not dispute that he took and carried away over $100 that belonged to or was in the care, custody, control, management or possession of Dade Federal, which the parties stipulated to be a federally insured savings and loan association.

[3] The fifth circuit at one time took the position that the government had a heavier burden of proof when relying on circumstantial evidence of a crime than when relying on direct evidence. Under that view, the district court was required to grant an acquittal unless the circumstan-

free to choose among reasonable constructions of the evidence. Viewing the evidence presented in this case and the inferences that may be drawn from it in the light most favorable to the government, *see, e.g., Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942), we conclude that it was sufficient to allow a reasonable jury to find that Bell altered the endorsement on the check, deposited it to his account, and thereby was enabled to take and did take $10,000 with intent to steal from the care, custody, control, management or possession of Dade Federal.

AFFIRMED.

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tial evidence was "inconsistent with every reasonable hypothesis of innocence." *E.g., Kassin v. United States*, 87 F.2d 183, 184 (5th Cir. 1937). In 1954 the Supreme Court stated that circumstantial evidence was not intrinsically different from testimonial evidence, and described the every reasonable hypothesis jury instruction as "confusing and incorrect." *Holland* v. *United States*, 348 U.S. 121, 139-40, 75 S.Ct. 127, 137-38, 99 L.Ed. 150 (1954). Despite the Supreme Court's criticism the fifth circuit did not abandon the hypothesis of innocence language, but attempted to reconcile it with *Holland* by rephrasing the test. *See United States v. Squella-Avendano*, 478 F.2d 433, 437 (5th Cir. 1973); *United States v. Warner*, 441 F.2d 821, 825 (5th Cir.), *cert. denied*, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58 (1871); *Riggs v. United States*, 280 F.2d 949, 954-55 (5th Cir. 1960); *Cuthbert v. United States*, 278 F.2d 220, 224-25 (5th Cir. 1960). All of the other circuits have abandoned the hypothesis of innocence phraseology. *See United States v. Davis*, 562 F.2d 681, 689 & n.10 (D.C. Cir. 1977); *United States v. Gabriner*, 571 F.2d 48, 50 (1st Cir. 1978); *United States v. Elsbery*, 602 F.2d 1054, 1057 (2d Cir.), *cert. denied*, 444 U.S. 994, 100 S.Ct. 529, 62 L.Ed.2d 425 (1979); *United States v. Fiore*, 467 F.2d 86, 88 (2d Cir. 1972), *cert. denied*, 410 U.S. 984, 93 S.Ct. 1510, 36 L.Ed.2d 181 (1973); *United States v. Hamilton*, 457 F.2d 95, 98 (3d Cir. 1972); *United States v. Chappell*, 353 F.2d 83, 84 (4th Cir. 1965); *United States v. Conti*, 339 F.2d 10, 12-13 (6th Cir. 1964); *United States v. Wigoda*, 521 F.2d 1221, 1225 (7th Cir. 1975), *cert. denied*, 424 U.S. 949, 96 S.Ct. 1421, 47 L.Ed.2d 355 (1976); *United States v. Carlson*, 547 F.2d 1346, 1360 (8th Cir. 1976), *cert. denied*, 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977); *United States v. Nelson*, 419 F.2d 1237, 1242-45 & nn. 18 & 19 (9th Cir. 1969); *United States v. Merrick*, 464 F.2d 1087, 1092 (10th Cir.), *cert. denied*, 409 U.S. 1023, 93 S.Ct. 462, 34 L.Ed.2d 314 (1972). We conclude that the difference is not merely semantic, and specifically adopt, as the more precise statement of the law, the test as set out in the text above.

TJOFLAT, Circuit Judge, joined by GODBOLD, Chief Judge, HATCHETT and THOMAS A. CLARK, Circuit Judges, dissenting:

There is little question that Nelson Bell engaged in some form of criminal activity: Bell wrongfully obtained $10,000 that belonged to another. The issue, however, is not whether Bell committed a crime, but whether his conduct was proscribed by the federal bank robbery statute, 18 U.S.C. § 2113(b) (1976). Because I believe that it was not, I respectfully dissent.

The majority asserts that Bell's presentation of the altered check to Dade Federal for credit to his account and his subsequent withdrawal of the funds represented by that check amounted to the crime of fraud by false pretenses and that this activity violated section 2113(b). Assuming, *arguendo*, that Bell committed fraud by false pretenses,[1] I take issue with the majority

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[1] Although the majority finds, and my analysis assumes, sufficient evidence that Bell committed fraud by false pretenses against Dade Federal, I have serious doubts whether this is actually the case. The elements of common law false pretenses are a false representation of fact, scienter, intent to induce action in reliance on the misrepresentation, justifiable reliance by the party fraudulently induced, and *loss* to that party resulting from such reliance. *Prosser, Law of Tort*, § 105 at 685-86 (4th ed. 1972); *see generally Torcia, Wharton's Criminal Law*, §§ 422-452 (14th ed. 1980). There is no evidence in this case that Dade Federal suffered any loss as a result of Bell's activities. The evidence showed that Bell presented the altered check to Dade Federal for deposit to his account. Dade Federal did not immediately credit Bell's account however, instead it waited until the check had been paid by the drawee bank in Cincinnati. According to the evidence then, when Bell withdrew the $10,000 from his Dade Federal account he in essence withdrew funds that had been provided Dade Federal by the Cincinnati bank. There was no proof that Dade Federal was ever called upon by the Cincinnati bank to absorb that bank's loss, or that of the maker, and the trial judge's instructions did not speak to that issue. Therefore, we have a case in which the government failed to prove that the alleged victim of fraud by false pretenses, Dade Federal, suffered any loss.

The government's proof established nothing more than that Dade Federal was a conduit through which Bell was enabled to appropriate the funds of another. Therefore, even if § 2113(b) could be read to pro-

over whether the federal bank robbery statute should be interpreted to proscribe that crime.

That statute provides:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. ...

18 U.S.C. § 2113(b) (1976).

There can be no doubt that this provision is ambiguous. "[T]hroughout our jurisprudence, the courts have considered that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *United States v. McClain*, 545 F.2d 988, 995 (5th Cir. 1977), *quoting Rewis v. United States*, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed.2d 493 (1971). "The rule that penal laws are to be construed strictly, is, perhaps, not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals." *United States v. Boston and Maine R.R.*, 380 U.S. 157, 160, 85 S.Ct. 868, 870, 13 L.Ed.2d 728 (1965), *quoting United States v. Wiltberger*, 5 Wheat. (18 U.S.) 76, 5 L.Ed. 37 (1820). "Of course, the doctrine of strict construction is not absolute. '[T]he intention of the lawmaker must govern in the construction of penal ... statutes.'" *McClain*, 545 F.2d at 996 (citations omitted).

Applying these principles, the Court of Appeals for the Ninth Circuit analyzed the legislative history of section 2113(b), and not only concluded that a narrow construction of that provision was appropriate, but also specifically held that a crime of false pretenses beyond the statute's reach. *LeMasters v. United States*, 378 F.2d 262, 267-68 (9th Cir. 1967). I can do no better than

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hibit fraud by false pretenses, the evidence presented in this case was insufficient to convict Bell.

recite the Ninth Circuit's painstaking parsing of congressional intent:

> The 1937 enactment of 18 U.S.Code § 2113(b) had a background and legislative history wholly different from those of the 1919 stolen motor vehicle act. *We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions.* In 1937, without any further discussion of evil to be cured, Congress enacted § 2113 clearly covering robbery and burglary, and including § 2113(b), the provision containing the ambiguous words "steal" and "purloin." In construing the words we are obliged by the Turley case to give them a "meaning consistent with the context in which [they] appear." *We think that that context, in the light of legislative history, requires that they be construed as not covering the obtaining of money by false pretenses.* The words are used in conjunction with the words "takes and carries away," and these are the classic words used to define larceny. The words do not have a necessary common law meaning; rather, they are ambiguous. They are used in a statute, the purpose of which, as stated in its title, is "* * * to include larceny." In such a case, the title is "a useful aid in resolving ambiguity [sic]. . . ."
>
> In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. *Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank of* [sic] *federal crime, that such*

> *an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law.* None of the reasons which persuaded the circuits and finally the Supreme Court to interpret broadly the word stolen in the motor vehicle act were present in 1937, when Congress wrote § 2113, or are present today.
>
> *If the oft cited canon of statutory construction that ambiguities in penal statutes are to be resolved in favor of the accused has any vitality, this is a plain case for its application.*

Id. (citations omitted) (emphasis supplied). *See Jerome v. United States*, 318 U.S. 101, 105-6, 63 S.Ct. 483, 486, 87 L.Ed. 640 (1943); *United States v. Feroni*, 655 F.2d 707, 710-711 (6th Cir. 1981).

I find this analysis of congressional intent very persuasive. The resolution of the ambiguity which section 2113(b) manifests is significantly aided by the legislative history which shows that Congress expressly considered, but rejected, the inclusion of fraud by false pretenses within the statute's purview.[2] I am also cognizant of the precept of strict construction of criminal statutes and of the Supreme Court's directive that federal courts "must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U.S. at 104, 63 S.Ct. at 485 (interpreting

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[2] Notably, none of the decisions which "broadly construe[] § 2113(b) [see majority opinion, note 1, *supra*] examines the legislative history of that enactment. Each of those decisions is nothing more than a mechanical application of [*United States v. Turley*, 352 U.S. 407, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957)]. They provide no discussion of why the context of § 2113(b) suggested that a broad interpretation of its provisions is appropriate." *United States v. Feroni*, 655 F.2d 707, 710 (6th Cir. 1981). Conversely, the courts that have adopted a narrower construction of § 2113(b) have relied extensively on the statute's legislative history. *See Feroni, supra; United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967); *United States v. Rogers*, 289 F.2d 433, 437-38 (4th Cir. 1961).

earlier version of federal bank robbery statute). Given all of this, I would hold that section 2113(b) does not encompass conduct which amounts only to fraud by false pretenses. *Accord, United States v. Feroni*, 655 F.2d 707 (6th Cir. 1981); *United States v. Pinto*, 646 F.2d 833 (3d Cir.), *cert. denied*, ___ U.S. ___, 102 S.Ct. 94, 70 L.Ed.2d 85 (1981); *LeMasters v. United States*, 378 F.2d 262 (9th Cir. 1967).

I disagree with the majority that *Thaggard v. United States*, 354 F.2d 735 (5th Cir. 1965), *cert. denied*, 383 U.S. 958, 86 S.Ct. 1222, 16 L.Ed.2d 301 (1966), controls this case. In *Thaggard*, the defendant drew money from his bank account when he knew that the bank had mistakenly overcredited that account. Thus, the common law equivalent of Thaggard's activity was more in the nature of *conversion*, rather than false pretenses. Moreover, the bank in *Thaggard*, unlike Dade Federal in this case, suffered a tangible loss. See note 1, *supra*. Finally, the majority's reading of *Thaggard* as holding that section 2113(b) embraces "all felonious takings" is erroneous: that language in *Thaggard* is plainly dicta, not at all necessary to the result. The majority's use of *Thaggard* to extend section 2113(b)'s reach to include fraud by false pretenses is, therefore, misguided, especially in light of the legislative history and rules of construction I have discussed.

I have no quarrel with the majority's adoption of a test for sufficiency of the evidence which inquires whether "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." Majority opinion at slip op. p. 15227, pp. ___. The application of this test does not change my analysis of this case or the conclusions I have reached, however, for even if there were overwhelming evidence that Bell subjected Dade Federal to the crime of fraud by false pretenses, I would nevertheless hold that a section 2113(b) prosecution could not lie.

I respectfully dissent.

R. LANIER ANDERSON, III, Circuit Judge, joined by RONEY and THOMAS A. CLARK, Circuit Judges, specially concurring:

I concur in the opinion, and I write separately only to state my understanding that Judge Vance's opinion does not change the substantive law of this circuit with respect to the standard of review for sufficiency of the evidence. To say that the evidence is sufficient if "a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt," *supra* Slip op. at 15227, at ____, is not substantively different from saying that the evidence is sufficient if a reasonable trier of fact could find that the "evidence was inconsistent with every reasonable hypothesis of innocence." *United States v. Marx*, 635 F.2d 436, 438 (5th Cir. 1981). It is true that "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt," *supra* Slip op. at 15227, at ____, but it is equally true that if a hypothesis of innocence is sufficiently reasonable and sufficiently strong, then a reasonable trier of fact *must* necessarily entertain a reasonable doubt about guilt.

UNITED STATES COURT OF APPEALS
*FOR THE FIFTH CIRCUIT

No. 79-5741

D.C. Docket No. 79-00220

Filed July 9, 1982

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
versus
NELSON BELL, DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON, and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby affirmed.

June 1, 1982

TJOFLAT, Circuit Judge, joined by GODBOLD, Chief Judge, HATCHETT and THOMAS A. CLARK, Circuit Judges, dissenting.

R. LANIER ANDERSON, III, Circuit Judge, joined by RONEY and THOMAS A. CLARK, Circuit Judges, specially concurring.

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* Former Fifth Circuit case, Section 9(1) of Public Law 96-452, October 14, 1980.

A True Copy
Attested:
Clerk, U.S. Court of Appeals, Eleventh Circuit

By: /s/ HENRIETTA BARNES
DEPUTY CLERK
ATLANTA, GA.

ISSUED AS MANDATE: Jul 6 1982

Supreme Court of the United States

No. 82-5119

NELSON BELL, PETITIONER,

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 29, 1982

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No. 82-5119

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NELSON BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

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QUESTION PRESENTED

Whether a taking of money from a federally insured bank by false pretenses violates 18 U.S.C. 2113(b).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-5119

NELSON BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The en banc opinion of the court of appeals (Pet. App. C) is reported at 678 F.2d 547. The panel opinion (Pet. App. A) is reported at 649 F.2d 281.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 1, 1982. The petition for a writ of certiorari was filed on July 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of taking money from a federally insured savings and loan

association in violation of 18 U.S.C. 2113(b) and was sentenced to a term of one year's imprisonment. A divided panel of the court of appeals reversed (Pet. App. A). The en banc court of appeals vacated the panel opinion and affirmed petitioner's conviction (Pet. App. C).

1. The evidence at trial is set out in the opinions below (Pet. App. A 5073; Pet. App. C 15226). Briefly, it established that on or about October 13, 1978, Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio, to their investment agent in Florida. The agent was to deposit the check into their savings account at the Dade Federal Savings and Loan Association. The check bore the limited endorsement on the back, "Deposit only to account of Lawrence and Elaine Rogovin," and gave their account number. The agent never received the check. A few days later, petitioner opened an account at a Dade Federal branch office, using a false address, birth date, and social security number. Later that day, at a different branch of the bank, petitioner deposited the Rogovins' $10,000 check into his new account, giving a second false address. The Rogovins' account number on the back of the check had been scratched out and petitioner's new account number had been substituted in its place. After a 20-day holding period, but before the Rogovins discovered what had happened to their check, petitioner withdrew the $10,000 in cash, with accrued interest, from his account, giving a third false address.

2. A divided panel of the court of appeals reversed petitioner's conviction (Pet. App. A 5072-5076). Although the court did not question the application of Section 2113(b) to theft by false pretenses (id. at 5073-5074), it held that the evidence was insufficient to prove that petitioner had a specific

intent to steal the $10,000 from the bank when he withdrew the funds (id. at 5074-5076).

The court of appeals granted rehearing en banc (Pet App. B), vacated the panel opinion, and affirmed petitioner's conviction (Pet. App. C 15225-15231). With respect to the question presented in the instant certiorari petition -- whether Section 2113(b) prohibits the obtaining of property from a bank by false pretenses -- the majority adopted the earlier holding of the Fifth Circuit in Thaggard v. United States, 354 F.2d 735 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966). In Thaggard, the Fifth Circuit, relying upon this Court's decision in United States v. Turley, 352 U.S. 407, 417 (1957), held that Section 2113(b) embraces "all felonious takings * * * with intent to deprive the owner of the rights and benefits of ownership regardless of whether or not the theft constitutes common law larceny" (Pet. App. C 15226, quoting 354 F.2d at 737).

Four judges dissented from this aspect of the en banc decision. The dissent expressed some doubt that the evidence was sufficient to support a finding that petitioner had acquired property from the bank by false pretenses (Pet. App. C 15228 n.1). But assuming that the evidence was sufficient, the dissent disagreed with the majority's conclusion that theft by false pretenses is within the reach of 18 U.S.C. 2113(b) (Pet. App. C 15228-15231). The dissent was persuaded by the analysis of the statute and its legislative history by the Ninth Circuit to reach a contrary conclusion in LeMasters v. United States, 378 F.2d 262, 267-268 (9th Cir. 1967). The dissent also cited the decision in United States v. Peroni, 655 F.2d 707, 710-711 (6th Cir. 1981), which followed LeMasters, and this Court's decision in Jerome v. United States, 318 U.S. 101, 105-106 (1943).

Accordingly, the dissent would have held that petitioner's conduct did not constitute a violation of 18 U.S.C. 2113(b).

DISCUSSION

This case presents an issue of statutory construction on which there is a multi-circuit conflict. Accordingly, as indicated below, we do not oppose grant of the petition. While there is a need to resolve the conflict, we cannot say that the issue is one that is independently of great moment. We have therefore dealt with the issue in considerable detail in this Memorandum, in order to facilitate the Court's ability to decide the case without plenary briefing and argument, should it be disposed to do so.

Petitioner contends (Pet. 2-4) that 18 U.S.C. 2113(b) 1/ does not prohibit theft of property by false pretenses. 2/ The crime of false pretenses traditionally was distinguished from larceny by the fact that the latter required a trespassory or nonconsensual acquisition of the property from another, while in false pretenses the property and title thereto were acquired with the consent of the other party, albeit a consent procured by false or fraudulent representations. See W. La Fave and A. Scott, Jr., Criminal Law 618, 622, 655 (1972); J. Miller, Criminal Law 340-341, 348-382, 390 (1934). If the distinction

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1/ 18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

2/ Petitions for a writ of certiorari raising the same issue in cases from other circuits also are pending before this Court. See Brown v. United States, No. 82-5201, and Shoels v. United States, No. 82-5550.

were followed in this case, petitioner's conduct would constitute false pretenses, not larceny, at least as larceny was defined at common law, because petitioner's withdrawal of the money from his account was with the consent of the bank, albeit a consent procured by his fraudulent conduct.

1. Section 2113(b) provides that "[w]hoever takes and carries away, with intent to steal or purloin," any money or property of value exceeding $100, belonging to or in the possession of a federally chartered or insured bank or other financial institution, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both. Petitioner's conduct in this case certainly falls within the literal terms of this language. When petitioner withdrew the $10,000 plus interest from his account, he can be said to have "taken" the money from the teller who paid the money over to him; when petitioner left the bank, he "carried away" the money; and it seems clear that petitioner did these acts "with intent to steal or purloin" the money, in the sense that he intended to deprive the bank or the true owner of the use or benefit of the funds.

The Eleventh Circuit in this case agreed that the quoted language prohibits the obtaining of property by false pretenses, not merely by larceny, and that the language therefore applied to petitioner's conduct. In so holding, the court reaffirmed the Fifth Circuit's prior conclusion to the same effect in Thaggard v. United States, supra, where the court stated that "the term 'steal,' as used in 18 U.S.C. 2113(b), embraces 'all felonious takings * * * with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft

constitutes common-law larceny'" (Pet. App. C 15226, quoting 354 F.2d at 737).

In Thaggard, the Fifth Circuit in turn had relied upon this Court's decision in United States v. Turley, 352 U.S. 407 (1957). Turley involved a construction of the Dyer Act, 18 U.S.C. 2312, which provides criminal sanctions for "[w]hoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen * * *." The defendant in Turley argued that the Dyer Act's prohibition against transportation of "stolen" vehicles was limited to vehicles that had been wrongfully acquired by larceny, not by embezzlement or other means of theft. This Court disagreed. The Court observed that where a federal criminal statute uses a common law term without otherwise defining it, the practice is to give the term its common law meaning. But the Court found that the term "stolen" or "stealing" had no accepted common law meaning and was never equated with larceny, noting that the term was commonly defined to include a broad range of thefts, including larceny, embezzlement, and false pretenses. 352 U.S. at 411-412.

The Court in Turley also found this interpretation supported by the legislative history of the Dyer Act and by the Congressional purpose to utilize the federal government's jurisdiction over interstate commerce to prevent the widespread movement of wrongfully taken automobiles, and thereby to furnish federal assistance in an area with which the states could not fully deal. 352 U.S. at 413-417. Against this background, the Court held that the Dyer Act required an interpretation of the term "stolen" that was not limited to situations considered at common law to be larceny, but rather "includes all felonious

takings with intent to deprive the owner of the rights and benefits of ownershp" (352 U.S. at 417).

In Thaggard, the Fifth Circuit relied upon this conclusion in Turley regarding the breadth of the term "stolen" in the Dyer Act and held that the term "steal" used in 18 U.S.C. 2113(b), the bank theft statute at issue here, likewise should be read to encompass more than larceny. In so doing, the Fifth Circuit rejected the Fourth Circuit's contrary dictum in United States v. Rogers, 289 F.2d 433, 437 (4th Cir. 1961), where that court accepted the premise that Section 2113(b) reaches only the offense of larceny as that crime had been defined at common law. 3 /

The majority of the other courts of appeals that have considered the question have reached the same conclusion regarding the scope of Section 2113(b), likewise finding on the basis of Turley and similar lower court decisions that the word "steal" in that Section has a meaning broader than common law larceny and embraces theft offenses generally. See, e.g., United States v. Pistel, 460 F.2d 157, 162-163 (2d Cir. 1972) 4 /; United States v. Guiffre, 526 F.2d 126, 127-128 (7th Cir.), cert.

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3 / The pertinent language in Rogers was dictum because the court of appeals held that the conduct there in issue, whereby the defendant took advantage of a unilateral mistake by the bank to obtain the money, constituted larceny at common law in any event. 289 F.2d at 437-439. The contrary language in Thaggard actually also was dictum, because the case had been tried under a theory that required the jury to find the defendant guilty of the crime of larceny, not false pretenses. 354 F.2d at 737-738. Moreover, as pointed out in the government's brief in opposition to the certiorari petition in Thaggard, the conduct involved, like that in Rogers, constituted larceny at common law because it involved a unilateral mistake. Br. in Opp., No. 990, 1965 Term at 4-5 & n.3. The Fifth Circuit followed Thaggard in Williams v. United States, 402 F.2d 259 (1968), without further discussion.

4 / Followed in United States v. Tavoularis, 515 F.2d 1070, 1074 n.7 (2d Cir. 1975).

denied, 439 U.S. 833 (1976) 5 /; United States v. Shoels, No. 81-1748 (10th Cir. Aug. 11, 1982), slip op. 4-9, petition for cert. pending, No. 82-5550 (filed October 8, 1982); United States v. Simmons, 679 F.2d 1042, 1045-1046 (3d Cir. 1982), petition for cert. pending sub nom. Brown v. United States, No. 82-5201 (filed Aug. 7, 1982). 6 / In addition, the Third Circuit, after a review of the legislative history of the 1937 statute in which the present Section 2113(b) was enacted and of subsequent amendments to the Bank Robbery Act, concluded that the intent of Congress underlying the statute extended, at least in part, to protecting the federal goverment's financial interest in the institutions protected by the statute. See 679 F.2d at 1046-1048.

Aside from this precedent supporting a broad interpretation of Section 2113(b), it must be stressed that a construction of Section 2113(b) that limits its scope to larceny generally as understood at common law would perpetuate in this setting the technical and long-discredited distinctions between various types of theft offenses as they existed in years past. One such distinction that may be especially anomalous in the context of bank theft is that between larceny by trick, in which the thief fraudulently induces the owner to part with possession of the property, and false pretenses, in which the thief fraudulently induces the owner to part with title to the property. The former

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5 / As pointed out in the government's brief in opposition to the petition in Guiffre, the conduct there in issue constituted larceny at common law, and the question whether Section 2113(b) applied to conduct other than larceny therefore was not directly raised. Br. in Opp., No. 77-1778, 1978 Term, at 2-4.

6 / In United States v. Johnson, 575 F.2d 678, 679-680 (8th Cir. 1978), the Eighth Circuit expressed doubt that Section 2113(b) is limited to common law larceny, but found it unnecessary to resolve the issue.

was regarded as larceny at common law, but the latter was not. La Fave & Scott, supra, § 91, at 67. If Section 2113(b) were interpreted to embody the offense of larceny as defined at common law, larceny by trick of more than $100 from a federally chartered or insured bank would be a federal felony, yet the obtaining of title to the same amount of money by false pretenses -- petitioner's conduct here -- would not even be an offense under that Section. Not only might such a result appear anomalous with respect to the culpability of the wrongdoer; it also would leave a gap of uncertain dimensions in federal protection for federally chartered or insured financial institutions. 7 /

Such technical distinctions between various types of theft offenses were subject to substantial criticism in the 1930's, when the present Section 2113(b) was enacted. See, e.g., Miller, Criminal Law 374 (1934), quoting Note, 2 Calif. L. Rev. 334, 335 (1914):

> The boundary line separating [common law larceny, embezzlement, and false pretenses] is often too difficult to ascertain in advance * * *. The result is that when the District Attorney has charged one of these crimes, the defendant often secures an acquittal by proving he is guilty of one of the others. There may be some who believe the subtle distinctions in these crimes inherent in the nature of things, but it is submitted that their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace.

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7 / Embezzlement and misapplication of funds by officers and employees of banks are separately prohibited by 18 U.S.C. 656, and the acquisition of property by fraudulent means would be barred in at least some circumstances by 18 U.S.C. 1014, considered recently by this Court in Williams v. United States, No. 80-2116 (June 29, 1982). See, e.g., United States v. Pinto, 646 F.2d 833, 838 (2d Cir. 1980), cert. denied, No. 81-2088 (Oct. 4, 1982).

See also Morissette v. United States, 342 U.S. 246, 271 (1952); American Law Institute, Model Penal Code, § 223.1(1) (Proposed Offical Draft 1962); National Commission on Reform of Federal Criminal Laws, Final Report § 1731(1) (1971). Indeed, for this very reason, a number of states had amended their theft statutes by the 1930's and redefined "larceny" as a generic offense that included obtaining of property by false pretenses. 8 / Similarly, Congress enacted a theft statute in 1940 relating to investment companies, which, although entitled "Larceny and Embezzlement," applied broadly to whoever "steals, unlawfully converts * * * or embezzles" money or property. 15 U.S.C. 80a-36, Act of Aug. 17, 1940, Section 37, 54 Stat. 841. Thus, by the 1930's, the term "larceny" was often defined by statute to embrace offenses other than the offense of larceny as known at common law. Indeed, in Prince v. United States, 352 U.S. 322, 324 n.2 (1951), this Court stated that its use of the terms "robbery" and "larceny" in its opinion concerning Section 2113 "refer not to the common-law crimes, but rather to the analogous offenses in the Bank Robbery Act."

2. Several other courts of appeals, however, have reached a contrary conclusion. In addition to the dictum in the Fourth Circuit's opinion in United States v. Rogers, supra, the Sixth and Ninth Circuits have held that Section 2113(b) is limited to the offense of larceny generally as understood at common law. United States v. Peroni, 655 F.2d 707, 709-711 (6th Cir. 1981);

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8 / See, e.g., Gilbert's Annotated Criminal Code and Penal Law of New York § 1290 (1937); Mass. Gen. Laws, Ch. 266, § 30 (1932); Mason's Minn. Statutes §10358 (1927); Remington's Rev. Stats. of Wash., Tit. 14, ch. 9, § 2601 (1932); R. I. Gen. Laws, Tit. 39, ch. 397, § 15 (1923); W. Va. Code, ch. 61, § 5965 (1932); Code of Va., Tit. 40, Ch. 179, § 4459 (1918).

LeMasters v. United States, 378 F.2d 262, 263-268 (9th Cir. 1967); Bennett v. United States, 399 F.2d 740, 744 (9th Cir. 1968); United States v. Sellers, 670 F.2d 853, 854 (9th Cir. 1982); but cf. United States v. Maloney, 607 F.2d 222, 230 & n.12 (9th Cir. 1979). We must acknowledge, moreover, that there are a number of factors that point to a narrower interpretation of Section 2113(b) than would appear to be called for by its plain language. Some of these factors have not been addressed or fully discussed by the courts that have held that Section 2113(b) prohibits the obtaining of money by false pretenses, and we therefore feel it appropriate to identify them here.

a. As we have pointed out above (see page 5, supra), the fraudulent acquisition of money involved in this case falls within the literal terms of Section 2113(b), which applies to "[w]hoever takes and carries away, with intent to steal or purloin," property belonging to or in the custody of a covered bank. But, as the Ninth Circuit pointed out in LeMasters v. United States, supra, 378 F.2d at 264, the quoted language actually employs terms that are similar to those used in the traditional formulation of common law larceny. Specifically, at common law, the criminal act of larceny was defined as the felonious or trespassory "taking and carrying away" of the property of another. See, e.g., La Fave & Scott, supra, § 85, at

622; 9 / id. § 86, at 631-633. In contrast, where the crime of false pretenses is concerned -- a crime in which the owner intends to part with the property and therefore consents to its acquisition by the thief -- the term "obtain," rather than "take and carry away," often has been used in describing the criminal act. See, e.g., 18 U.S.C. 1025; La Fave & Scott, supra, § 90, at 655; Miller, supra, § 118, at 382.

The phrase following the "takes and carries away" element of the offense described in Section 2113(b) -- "with intent to steal of purloin" -- describes the wrongful intent with which the criminal act must be performed in order for the actor to be guilty of an offense. Cf. United States v. Bailey, 444 U.S. 392, 402 (1980). The phrase "with intent to steal" has been used by some commentators in describing the scienter element of the traditional offense of larceny -- that the act be done with the intent to deprive the owner of the property permanently or for an unreasonably prolonged period of time. See, e.g., La Fave & Scott, supra, § 85, at 622 (quoted in note 9, supra); id. § 86, at 637-644; Miller, supra, § 114, at 365. Moreover, in the brief for the United States in Jerome v. United States, 318 U.S. 101 (1943), the government, while arguing for a broad reading of the bank burglary provision in what is now 18 U.S.C. 2113(a) that

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9 / La Fave & Scott state, at the page cited:

> Larceny at common law may be defined as the (1) trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it.

See also United States v. Turley, supra, 352 U.S. at 412, quoting Blackstone, IV Commentaries 229; 2 Burdick, The Law of Crime, § 496 (1946); Miller, Criminal Law, §190 (1934); Webster's New International Dictionary (2d ed. 1958); Blacks Law Dictionary (5th ed. 1978); United States v. Patton, 120 F.2d 73, 75 (3d Cir. 1941). Cf. Jolly v. United States, 170 U.S. 402, 404-405 (1898).

would have prohibited an entry into a bank to engage in fraudulent conduct defined as a felony under state law, described what is now Section 2113(b) as containing a definition of the offense of "larceny" that embodies the "common law concepts of * * * a taking and carrying away with intent to steal." 10 / See also Morissette v. United States, supra, 342 U.S. at 266 n.28 (describing comparable language in 18 U.S.C. (1940 ed.) 82); id. at 267-268 n.28 (comparing 18 U.S.C. (1940 ed.) 99 and 100). But cf. United States v. Amarata, 193 F. Supp. 624, 626 (D. Mass. 1961).

The fact that the word "steal" appears in the portion of Section 2113(b) that defines the mental element of the offense, rather than that defining the criminal act itself, might thus distinguish this case from United States v. Turley, supra. In Turley, the Court discussed the term "stolen" as used in the Dyer Act with reference to vehicles, and the generic offense of "stealing" to which the word "stolen" in the Dyer Act had reference. 352 U.S. at 411-413. In that setting, the terms "stolen" and "stealing" referred largely if not exclusively to the criminal act, not the criminal intent, and the word was read to include all types of theft. In Section 2113(b), however, the criminal act is defined in terms of whoever "takes and carries away," not whoever "steals." The analysis of the term "stealing" in Turley therefore may be thought not to resolve directly the issue presented here.

b. The legislative history of Section 2113, although recognized by this Court as "meager" (Jerome v. United States, supra, 318 U.S. at 105), also has led two courts of appeals to

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10 / See Brief for the United States, No. 325, 1942 Term, at 27.

conclude that Congress intended Subsection (b) of that Section to apply only to larceny as that term has been commonly understood. See United States v. Feroni, supra; LeMasters v. United States, supra. That legislative history is, in turn, discussed in this Court's opinion in Jerome, 318 U.S. at 102-104.

Prior to 1934, banks organized under federal law were protected against embezzlement (R.S. 5209), but not robbery, burglary, and larceny, which were punishable only under state law. By 1934, concern was expressed about the activities of gangsters who operated habitually from one state to another in robbing banks, and about the fact that state authorities frequently were unable to cope with the problem. Jerome, 318 U.S. at 102, citing H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934); see also S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934). The Attorney General proposed legislation to deal with this problem. S. 2841, 73d Cong., 2d Sess. This bill prohibited robbery (§ 4), burglary (defined as the breaking into a bank with intent to commit an offense defined by the bank-robbery act or to commit any felony under federal or state law) (§ 3), and theft (§ 2). The latter section provided criminal sanctions for whoever "takes and carries away" property belonging to or in the possession of a bank "(1) without the consent of such bank, or (2) with the consent of such bank, obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation." This latter clause plainly would have applied to petitioner's conduct in this case. The 1934 bill passed the Senate in this form. However, the House Judiciary Committee

struck Sections 2 and 3 without explanation, 11 / and the bill was enacted without them, applying principally to robbery. Jerome, 318 U.S. at 103.

In 1937, the Attorney General recommended amendment of the bank robbery statute "to include larceny and burglary" of banks. Jerome, 318 U.S. at 103, quoting H.R. Rep. No. 737, 75th Cong., 1st Sess. 1 (1937). The Attorney General explained that the limitation of the statute to robbery had produced "some incongruous results" -- a "striking instance" of which was a situation in which a man had managed to gain possession of a large sum of money in the momentary absence of a bank employee, without displaying force or violence or putting anyone in fear, as required for the offense of robbery. H.R. Rep. No. 732, supra, at 1-2. The example cited by the Attorney General would have constituted larceny at common law because the property was taken without the consent of the bank.

The 1937 bill, unlike the Attorney General's 1934 proposal, did not specifically address both consensual and nonconsensual takings. The Attorney General's bill was introduced by Representative Summers (H.R. 5900, 75th Cong., 1st Sess.; 81 Cong. Rec. 2731), and was enacted in essentially the same form as

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11 / Both the petitioner and the government in Jerome suggested that deletion of these provisions may have been attributable to Representative Sumners, the Chairman of the House Judiciary Committee, who, it was said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws, 1 Law & Contemp. Probs. 445, 448-449 (1934), quoted in Brief for the United States, at 18 & n.16, and Brief for Petitioner, at 19-20.

introduced. 12 / The Act itself was entitled an act "to amend the bank-robbery statute to include burglary and larceny" (ch. 774, 50 Stat. 749), and the Committee Reports describe the bill in the same way, 13 / thereby indicating that Congress apparently understood what is now Section 2113(b) to state an offense that could appropriately be termed "larceny." This Court in Jerome likewise referred to what is now Section 2113(b) as defining the offense of "larceny" (see 318 U.S. at 103, 105, 106), a term that in Prince the Court employed to mean not "common law" larceny but rather the "analogous offense[ ]" in Section 2113. 352 U.S. at 324 n.2; see also id. at 326 & n.5, 327 & nn.6 & 7, 328-329 n.10 (referring to the offense as "larceny").

c. Although Section 2113(b) does not expressly refer to false pretenses, as did the Attorney General's 1934 proposal and the contemporary state statutes cited above that had expanded the definition of larceny beyond its common law scope (see pages 9-10 & n.8, supra), the mere use of the word "larceny" in the title of the Act and committee reports does not necessarily establish an intent to exclude theft by false pretenses. In the 1934 bill proposed by the Attorney General, for example, the theft section provided that whoever "takes and carries away" property with or without the consent of the bank was guilty of an offense. The

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12 / The provision relevant here was amended on the House floor to provide misdemeanor sanctions for cases involving less than $50 and felony sanctions for cases involving $50 or more. 81 Cong. Rec. 5376-5377. When the $50 amount was raised to $100 in 1948, the dollar figure was described as "the dividing line between petit and grand larceny." H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947). See also Prince v. United States, 352 U.S. 322, 328-329 n.10 (1957); Brief for the United States in Jerome, at 23.

13 / H.R. Rep. No. 732, supra, at 1; S. Rep. No. 1259, 75th Cong., 1st Sess. 1 (1937).

use of the identical phrase "takes and carries away" in what was referred to as the "larceny" provision of the bill proposed by the Attorney General and enacted by Congress in 1937 therefore likewise could have been intended to incorporate both consensual and nonconsensual takings and therefore to apply to the theft by false pretenses involved here. In this regard, this Court in Jerome referred to the theft provision of the 1934 bill as "dealing with larceny" (318 U.S. at 103), despite the language covering the taking of property with the fraudulently obtained consent of the bank, and the Court elsewhere referred to this provision of the 1934 bill as having "defined larceny to include larceny by trick or fraud" (318 U.S. at 105). Against this background, it could be concluded that Congress used the phrase "takes and carries away" in what is now Section 2113(b) and attached the label "larceny" to that provision without intending to confine the statute to larceny as understood at common law.

There are, however, several factors that weigh against attributing to Congress on this basis an intent to bring false pretenses within the reach of Section 2113(b). First is the enactment of what is now 18 U.S.C. 1025 in 1939, two years after Section 2113(b) was enacted. Act of Aug. 5, 1939, ch. 434, 53 Stat. 1205. 14 / Section 1025 prohibits the obtaining of property by false pretenses upon any waters or vessel within the special maritime and territorial jurisdiction of the United

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14 / This enactment appears not to have been brought to the attention of any of the courts of appeals that have addressed this issue.

States. 15 / This provision was enacted in response to the recommendation of the Attorney General. He stated in a letter to Congress that existing federal statutes applicable in that special federal jurisdiction -- including, he stated, the statute prohibiting "larceny," 18 U.S.C. (1940 ed.) 466 (the present 18 U.S.C. 661) -- did not reach "card sharping" offenses on the high seas. Thus, he explained, he was recommending the enactment of legislation to prohibit obtaining money by false pretenses on the high seas, which would include the activities of card sharps within its scope. See S. Rep. No 446, 76th Cong., 1st Sess. 1 (1939).

The general federal larceny statute that was among the criminal statutes cited by the Attorney General as not covering the conduct in question was derived from a 1790 statute that was and is written in terms identical to Section 2113(b), applying to whoever "takes and carries away [property], with intent to steal or purloin." 16 / The enactment of Section 1025 in 1939 therefore might suggest that neither Congress nor the Attorney General in 1937 understood the identical language in Section 2113(b) (or the reference to that language as "larceny") to include false pretenses. But cf. United States v. Turley, supra, 352 U.S. at 415 n.14, in which the Court declined to attach

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15 / The statute may have been limited to vessels within the special maritime and territorial jurisdiction of the United States (which excludes areas within the jurisdiction of a State, see 18 U.S.C. 7(1)) because the offense of false pretenses on federal land within the jurisdiction of a State could be prosecuted pursuant to the Assimilative Crimes Act, 18 U.S.C. 13.

16 / The present 18 U.S.C. 661 is descended from the Act of Apr. 30, 1790, ch. 8, 1 Stat. 112, 116. It has been referred to as a "larceny" statute (Williams v. United States, 327 U.S. 711, 723 n.26 (1946); United States v. Sharpnack, 355 U.S. 286, 289 n.5 (1958)), although it has been held not to be confined to the contours of that offense as defined at common law with respect to the element of intent to deprive the owner of the property permanently. United States v. Gristeau, 611 F.2d 181, 183 (7th Cir. 1979); United States v. Maloney, 607 F.2d 222, 225-226 (9th Cir. 1979); United States v. Henry, 447 F.2d 283, 285 (3d Cir. 1971).

weight to Congress' failure to enact legislation requested by the Attorney General to clarify that the Dyer Act applied to transportation of "stolen" vehicles, whether or not acquired by common law larceny. 17 /

In addition, although the actual holding in Jerome concerns the scope of the bank burglary provision now contained, as amended, 18 / in the second paragraph of Section 2113(a), this Court took a view of the Bank Robbery Act and its legislative history in Jerome that is consistent with a narrow interpretation of Section 2113(b). The issue directly involved in Jerome was whether the prohibition in the bank burglary provision, which as originally enacted prohibited entering a bank with the intent to commit "any felony or larceny," applied to an entry to commit a felony as defined under state law. See 308 U.S. at 101-102. Jerome, a captain in the Army, had forged the signature of another officer as a co-signer of a note in order to obtain a $400 loan, on which he subsequently defaulted. The uttering of a forged promissory note was a felony under state law, and Jerome was charged with the federal offense of entering the bank to commit that state felony.

This Court held that the term "any felony" in the bank burglary provision did not include state felonies and included only federal felonies affecting banks. 352 U.S. at 107-108. In reaching this conclusion, the Court observed that the bill

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17 / In proposing the false pretenses on the high seas bill, the Attorney General explained that the Department's draft bill was patterned after the parallel provision of the District of Columbia Code. S. Rep. No. 466, supra, at 1. That provision, the present D.C. Code 22-1301, was amended by Congress in 1937, just two weeks before Section 2113(b) was enacted, to raise the dividing line between misdemeanor and felony false pretenses from $35 to $50. Act of Aug. 12, 1937, ch. 599, 50 Stat. 628. In that same Act, Congress amended the larceny provisions of the D.C. Code, the present Sections 22-2201 and 2202 (referring to "[w]hoever shall feloniously take and carry away"), to provide a parallel division between grand and petit larceny.

18 / See note 22, infra.

proposed by the Attorney General in 1934 would have expressly prohibited entering a bank to commit a felony under federal or state law and also "defined larceny to include larceny by trick or fraud" (318 U.S. at 105) -- a reference to the theft offense described in Section 2 of the Attorney General's 1934 proposal, quoted at page 14, supra. But, the Court noted, these proposals were not in the end incorporated in the 1934 Act, and the 1937 bill "did not renew the earlier proposals to include them" (318 U.S. at 105) but instead took a "selective" approach (id. at 107). 19 / The Court found it "difficult to conclude" that Congress, having rejected express language in the bank burglary provision in 1934 covering entries to commit state felonies, "reversed itself in 1937, and, through the phrase 'any felony or larceny' adopted the penal provisions of forty eight states with respect to acts committed in national or insured banks" (id. at 105-106). The Court then continued: "It is likewise difficult to believe that Congress, through the same clause, adopted by indirection much of the fraud provision which it rejected in

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19 / See also Prince v. United States, supra, 352 U.S. at 327 ("The only factor stressed by the Attorney General in his letter to Congress [in 1937] was the possibility that a thief might not commit all the elements of the offense of robbery").

1934. Cf. United States v. Patton, 120 F.2d 73" (318 U.S. at 106). 20 /.

The last-quoted passage indicates that the Court did not understand the phrase "any felony or larceny" in the burglary provision of the statute to encompass entry to commit the fraud or false pretenses offenses proposed in 1934 but not included in the 1937 Act. The Court twice stated in Jerome that the term "larceny" as used in this phrase "any felony or larceny" was defined elsewhere in the statute (318 U.S. at 105, 106) -- a reference to the "takes and carries away, with intent to steal or purloin" language now contained in Section 2113(b). 21 / If, as the Court indicated, fraud or false pretenses was not covered by

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20 / In United States v. Patton, 120 F.2d 73 (3d Cir. 1941), cited by the Court in the passage quoted, the defendant was employed as a clerk for a company that had a petty cash account at a bank, and he was authorized to make deposits and (with a co-signature of a fellow employee) to make withdrawals. The company drew a check on another bank payable to the petty cash account, and the defendant altered the amount from $1100 to $11,000. He then drew a check for approximately $11,000, forged the co-signature, and entered the bank and cashed the check therein. The defendant was indicted for (1) entering a national bank with intent to commit larceny, in violation of what is now 18 U.S.C. 2113(a), and (2) taking and carrying away with intent to steal or purloin money in excess of $50, in violation of what is now 18 U.S.C. 2113(b). 120 F.2d at 74. The government conceded that the taking and carrying away charged as offense (2) was the equivalent of the larceny mentioned in the unlawful entry charged in offense (1). Id. at 75. The Third Circuit reversed both convictions, concluding that there was no trespassory taking as required for the offense of larceny, but rather a turning over of the money with the fraudulently obtained consent of the bank (120 F.2d at 75-76) -- i.e., false pretenses -- an offense that the Third Circuit held was not covered by the statute.

In United States v. Pinto, 646 F.2d 833, 836 (3d Cir. 1981), the Third Circuit read Patton as involving only the bank burglary provision now contained in Section 2113(a). See also United States v. Handler, 142 F.2d 351, 353 (2d Cir. 1944). Subsequently, in United States v. Simmons, supra, the Third Circuit concluded that Section 2113(b) does apply to the offense of false pretenses, but without citing Patton.

21 / The government's brief in Jerome (at 27) likewise took the position that the "larceny" mentioned in the burglary prohibition was defined by what is now Section 2113(b). See also United States v. Patton, supra, 120 F.2d at 75.

the phrase "any felony or larceny" in the burglary provision, then, under the Court's reasoning, fraud or false pretenses likewise could be thought not to be covered by what the Court regarded as the relevant definition of the term "larceny" -- the present Section 2113(b), under which petitioner was convicted.

For the reasons just given, affirmance by this Court of the judgment below might require this Court to reconsider the language and to some extent the analysis of the decision in Jerome, although not the actual holding of that case regarding the scope of the bank burglary provision. 22 /

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1982

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22 / The specific holding in Jerome was incorporated by Congress in the 1948 revision of Title 18, when Congress changed the relevant language in what is now Section 2113(a) from "any felony or larceny" to read any felony affecting the bank "in violation of any statute of the United States, or any larceny." See H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947).

No. 82-5119

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NELSON BELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNIT B

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Whether the Federal Bank Robbery Statute 18 U.S.C. §2113(b) should be broadly construed and interpreted so as to include the crime of fraud by false pretenses for which Petitioner has been convicted?

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BRIEF FOR PETITIONER

OPINION BELOW

The en banc opinion of the Court of Appeals (J.A. 15)[1] is officially reported at 678 F.2d 547(1982). The panel opinion (J.A. 6) is officially reported at 649 F.2d 281(1981).

[1]The letters "J.A." followed by a number designate page reference to the Joint Appendix.

JURISDICTION

In a split decision, the Fifth Circuit Court of Appeals reversed the conviction. Timely petitions for rehearing and a suggestion for a hearing en banc were granted on September 4, 1981 (J.A. 14). The petition for a writ of certiorari and leave to proceed *in forma pauperis* were filed July 23, 1982, and were granted on November 29, 1982, (J.A. 28). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

Title 18, United States Code

Sec. 2113 Bank robbery and incidental crimes

> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

STATEMENT OF THE CASE

Petitioner was indicted pursuant to 18 U.S.C. §2113(b). He allegedly took and carried away, with intent to steal and purloin, certain monies from Dade Federal Savings and Loan Association of Miami. These deposits were insured by Federal Savings and Loan Insurance Corporation. The money belonged to and was in the care, custody, control,

management and possession of Dade Federal (J.A. 3). Petitioner was convicted after a jury trial and sentenced to one year's imprisonment (J.A. 4) based on the following evidence adduced at trial.

On October 13, 1978, Lawrence Rogovin, in Cincinnati, Ohio, wrote a check for $10,000 on his and his wife's Cincinnati bank account. The check was made payable to Lawrence and Elaine Rogovin and bore the following limited endorsement on the reverse side:

> Deposit only to the account of Lawrence and Elaine G. Rogovin at Dade Federal Savings and Loan Account No. 02-1-1-159976-0

Elaine Rogovin mailed the $10,000 check to an agent in Dade County, Florida, on either October 13th or 14th. Said agent was to deposit the check in the Rogovin's account at Dade Federal. (R 24-34).[2] The agent never received this $10,000 check (R 83).

A few days later, petitioner opened a new account at the Alapattah Branch of Dade Federal with the minimum amount required, Fifty Dollars ($50.00) (R 38, 40, 43). He used his own name but a false address, birth date and social security number (R 123-124). Later that same day, petitioner went to another branch of Dade Federal and deposited into his new account a check in the amount of $10,000, giving a second false address. The $10,000 check was the same one mailed by the Rogovins except that their account number on the back of the check had been scratched out and replaced by petitioner's account number. (R 46-48; 126). Dade Federal accepted the check for deposit and placed a 20-day hold on it (R 47-49). Twenty-one days later, petitioner withdrew the

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[2]The letter "R" followed by a number designates page reference to the trial transcript.

total amount of his account, including interest, giving a third false address (R 53-55, 65, 127).

Petitioner's conviction was reversed on appeal by a divided panel which held that the evidence was insufficient to prove that petitioner had a specific intent to steal the $10,000 from the bank when he withdrew the funds (J.A. 10-12). The court of appeals granted a rehearing en banc (J.A. 14). The panel opinion was vacated and petitioner's conviction affirmed based upon the earlier holding of the Fifth Circuit in *Thaggard v. United States,* 354 F.2d 735 (5th Cir. 1965), cert. denied, 383 U.S. 958 (1966) (J.A. 15). In *Thaggard,* the Fifth Circuit, relying upon this Court's decision in *United States v. Turley,* 392 U.S. 407, 417 (1957), held that §2113(b) embraces "all felonious taking . . . with intent to deprive the owner of the rights and benefits of ownership regardless of whether or not the theft constitutes common law larceny." 354 F.2d at 737.

The dissenting judges, persuaded by the analysis of the statute and its legislative history provided in *Le Masters v. United States,* 378 F.2d 262 (9th Cir. 1967), disagreed with the majority's conclusion that theft by false pretenses is within the reach of 18 U.S.C. §2113(b) (J.A. 21-24). The dissent further cited the decision in *United States v. Feroni,* 655 F.2d 707 (6th Cir. 1981) which followed *Le Masters,* and this Court's decision in *Jerome v. United States,* 318 U.S. 101 (1943) as support for a contrary conclusion.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals broadly interpretated 18 U.S.C. §2113(b) to include the crime of obtaining money from a federal bank by false pretenses. The statute itself is

couched in the words of common-law larceny. The legislative history of this statute, as well as the canons of statutory interpretation, clearly does not support such an extension. Thus, the court of appeal's erroneous holding must be reversed.

POINT I

THE LEGISLATIVE HISTORY DOES NOT SUPPORT THE CONCLUSION THAT 18 U.S.C. §2113(b) ENCOMPASSES MORE THAN COMMON-LAW LARCENY

Petitioner was convicted of having obtained money from a bank by false pretenses in violation of 18 U.S.C. §2113(b).[3] Petitioner contended that the statute only covered common-law larceny, defined as a felonious or trespassory "taking or carrying away" of the property of another[4] and not obtaining money by false pretenses. As pointed out by the Ninth Circuit in *Le Masters v. United States,* 378 F.2d 262, 264 (1967), the quoted language actually employs terms that are similar

[3]18 U.S.C. §2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both. . . .

[4]See *e.g.* La Fave & Scott, *Criminal Law* at 622, 631-3.

> Larceny at common-law may be defined as the (1) the trespassory (2) taking and (3) carrying away of the (4) personal property (5) of another (6) with intent to steal it.

In the brief for the United States, in *Jerome,* the government described what is now §2113(b) as containing a definition of the offense of "larceny" that embodies the "common-law concepts of . . . a taking and carrying away with intent to steal." No. 325, 1942 Term, at 27.

to those used in the traditional formulation of common-law larceny. A distinction has been cited at common-law between the crimes of larceny (trespassory or non-consensual acquisition of the property from another) and false pretenses (consensual acquisition of property and title thereto procured by fraud or fraudulent representations).[5]

The Appellate Court based its decision upon *Thaggard v. United States,* 354 F.2d 735 (5th Cir. 1965), cert. denied 383 U.S. 958(1966)[6] which broadly construed the statute's ambiguous term "steal" as to embrace "all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constituted common-law larceny." *Id.,* at 737 quoting *United States v. Turley,* 352 U.S. 407 (1957). Petitioner contends that this interpretation is erroneous.

In *Turley,* this Court interpreted 18 U.S.C. §2312, entitled the National Motor Vehicle Act, more commonly known as the Dyer Act, which provides criminal sanctions for "whoever transports interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen . . ."[7] The Court addressed the issue of whether the meaning of the

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[5]See La Fave & Scott, *supra,* 618, 622, 655 (1972); Miller, *Criminal Law* 340-1, 348-82, 390 (1934).

[6]The court noted at the outset that the Federal Statute made no mention of "larceny;" rather it was couched in terms of "steal and purloin." Though the court was aware of the Fourth Circuit's statement that paragraph (b) of the bank robbery act reached only the offense of common-law larceny, *United States v. Rogers,* 289 F.2d 433, 437 (4th Cir. 1961), the Fifth Circuit nevertheless accepted this Court's decision in *Turley* as ruling. *Supra,* at 736.

[7]The original Act, sponsored by Representative Dyer became law in 1919, 41 Stat. 324. It was amended in 1945 to include aircraft, 59 Stat. 536, and was re-enacted in 1948 as part of the Criminal Code, 62 Stat. 806.

word "stolen" was limited to common-law larceny or other felonious takings as well. *Supra,* at 408. Having determined that the term "stolen" or "stealing" has no accepted common-law meaning,[8] the Court proceeded to examine the statute's legislative history.

Though most of the states had local theft statutes which included not only common-law larceny but false pretenses, larceny by trick, and other types of wrongful taking, the advent of the automobile created necessity for federal action. A committee report entitled "Theft of Automobiles"[9] pointed to the increasing number of automobile thefts, the resulting financial losses and the increasing cost of automobile theft insurance as well as asserting the inadequacy of state laws in coping with the problem. The report, as cited in *Turley, supra,* at 414 n. 13, began and ended as follows:

> "The Congress of the United States can scarcely enact any law at this session that is more needed than the bill herein recommended, and that has for its purpose the providing of severe punishment of those guilty of the stealing of automobiles in interstate or foreign commerce. . . . State laws upon the subject have been inadequate to meet the evil. Thieves steal automobiles and take them from one State to another and oft-times have associates in this crime who receive and sell the stolen machines. . . .
>
> "The purpose of the proposed law is to suppress crime in interstate commerce. Automobiles admittedly are tangible property, capable of being transmitted in interstate commerce. The larceny of automobiles is made a crime under the laws of all the States in the Union. No

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[8] *Supra,* at 411-2. This Court stated that "where a federal criminal statute uses a common-law term of established meaning without defining it, the general practice is to give the term its common-law meaning."

[9] H.R. Rep. No. 312, 66th Cong., 1st Sess.

> good reason exists why Congress, invested with the power to regulate commerce among the several States, should not provide that such commerce should not be polluted by the carrying of stolen property from one State to another. Congress is the only power competent to legislate upon this evil, and the purpose of this bill is to crush it, with the penalties attached." *Id.*, at 1, 4. See also, 58 Cong. Rec. 5470-5478, 6433-6435.

This Court concluded that "the Act requires an interpretation of 'stolen' which does not limit it to situations which at common law would be considered larceny. The refinements of that crime are not related to the primary congressional purpose of eliminating the interstate traffic in unlawfully obtained motor vehicles." *Supra,* at 417.

In *Thaggard,* the Fifth Circuit interpreted 18 U.S.C. §2113(b), the Federal Bank Robbery Act. The issue here, as in *Turley,* was whether the word "steal" encompassed more than common-law larceny. The court broadly construed the statute based upon *Turley.* In so doing, the Fifth Circuit rejected the Fourth Circuit's acceptance in *United States v. Rogers,* 289 F.2d 433, 437 (4th Cir. 1961), of the premise that §2113(b) reached only common-law larceny.[10] Having similarly relied on *Turley,* the Second Circuit, *United States v. Fistel,* 460 F.2d 157, 162-3 (2nd Cir. 1972), Seventh Circuit, *United States v. Guiffre,* 576 F.2d 126, 127-8 (7th Cir. 1978), cert. denied, 439 U.S. 833(1978), and the Eighth Circuit, *United States v. Johnson,* 575 F.2d 678, 679-80 (8th Cir. 1978) have held that a narrow construction of

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[10]The contrary language in *Thaggard* was also dictum as the case had been tried under a theory that required the jury to find the defendant guilty of larceny not false pretenses. *Supra,* at 737-8.

§2113(b) was not warranted.[11] None of the above mentioned circuits examines the legislative history of that enactment. Each of these decisions is nothing more than a "mechanical application of *Turley,*" providing no discussion as to why a broad interpretation of §2113(b) is appropriate. *United States v. Feroni,* 655 F.2d 707, 710 (6th Cir. 1981). The court further stated:

> The Circuits which have endorsed a broad construction of §2113(b) have miscalculated the effect of *Turley* on this question. *Turley* does not establish that the word "stolen" in any federal criminal statute includes all felonious takings. The Court simply found that the word is unencumbered by common law meanings. The opinion explicitly states that the meaning of the word should be consistent with the context in which it appears and further that it is appropriate to consider the purpose of the statute and to gain what light is available from the legislative history. . . . It is clear that the Court contemplated that "stolen" could have different meanings in different statutes. *Supra,* at 710.

This Court summarized the legislative history of 18 U.S.C. §2113 in *Jerome v. United States,* 318 U.S. 101, 102-4 (1943) as follows:

> Prior to 1934 banks organized or operating under federal law were protected against embezzlement and like offense by R.S. 5209, 40 Stat. 972, 12 U.S.C. §592, 12 U.S. C. A., §592. But such crimes as robbery, burglary

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[11]In *Fistel,* the court was asked to interpret the word "steal" as used in the National Stolen Property Act.

In *Guiffre,* the conduct in issue constituted common-law larceny, therefore the question whether §2113(b) applied to conduct other than larceny was not directly raised. Br. in Opp., NO71-1778, 1978 Term, at 204.

In *Johnson,* the court expressed doubt that §2113(b) is limited to common-law larceny but found it unnecessary to resolve the issue.

and larceny directed against such banks were punishable only under state law. By 1934 great concern had been expressed over interstate operations by gangsters againsts banks—activities with which local authorities were frequently unable to cope. H.Rep. No. 1461, 73d Cong., 2d Sess., p. 2. The Attorney General in response to that concern recommended legislation embracing certain new federal offenses. S. 2841, 73d Cong. 2d Sess. And see 78 Cong. Rec. 5738. Sec. 3 of that bill made it a federal crime to break into or attempt to break into such banks with intent to commit "any offense defined by this Act, or any felony under any law of the United States or under any law of the State, District, Territory, or possession" in which the bank was located. Sec. 2 made it an offense to take or attempt to take money or property belonging to or in the possession of such a bank without its consent or with its consent obtained "by any trick, artifice, fraud, or false or fraudulent representation." This bill was reported favorably by the Senate Judiciary Committee (S. Rep. No. 537, 73d Cong., 2d Sess.) and passed the Senate. 78 Cong. Rec. 5738. The House Judiciary Committee, however, struck out §2, dealing with larceny, and §3, dealing with burglary. H. Rep. No. 1461, *supra*, p. 1. And the bill was finally enacted without them. But it retained the robbery provision now contained in the first clause of §2(a) of the Bank Robbery Act.

In 1937 the Attorney General recommended the enlargement of the Bank Robbery Act "to include larceny and burglary of the banks" protected by it. H. Rep. No. 732, 75th Cong., 1st Sess., p. 1. The fact that the 1934 statute was limited to robbery was said to have produced "some incongruous results"—a "striking instance" of which was the case of a man who stole a large sum from a bank but who was not guilty of robbery because he did not display force or violence and did not put any one in fear. *Id.*, pp. 1-2. The bill as introduced (H.R. 5900, 75th Cong., 1st Sess., 81 Cong. Rec. 2731) added to §2(a)

two new clauses—one defining larceny and the other making it a federal offense to enter or attempt to enter any bank with intent to commit therein "any larceny or other depredation." For reasons not disclosed in the legislative history, the House Judiciary Committee substituted "any felony or larceny" for "any larceny or other depredation." H. Rep. No. 732, *supra*, p. 2. With that change and with an amendment to the larceny clause distinguishing between grand and petit larceny (81 Cong. Rec. 5376-5377), §2(a) was enacted in its present form.

In analyzing the legislative history of 18 U.S.C. §2113(b) the Ninth Circuit in *Le Masters, supra,* at 267-8 not only concluded that a narrow construction was appropriate but also specifically held the crime of false pretenses beyond the statute's reach. In delving into Congressional intent, the court stated:

The 1937 enactment of 18 U.S. Code §2113(b) had a background and legislative history wholly different from those of the 1919 Stolen Motor Vehicle Act. We are aware of no background of evil at which Congress was pointing the statute except the evil of interstate operation of gangster bank robbers. As we have seen, the Senate in 1934 passed a bill clearly and expressly creating several federal crimes against banks, including the crime of obtaining by false pretense. The House, and the Congress, rejected the bill, enacting only the robbery provisions. In 1937, without any further discussion of evil to be cured, Congress enacted §2113 clearly covering robbery and burglary, and including §2113(b), the provision containing the ambiguous words "steal" and "purloin." In construing the words we are obliged by the Turley case to give them a "meaning consistent with the context in which (they) appear." We think that the context, in light of legislative history, requires that they be construed as not covering the obtaining of money by

> false pretenses. The words are used in conjunction with the words "takes and carries away," and these are the classic words used to define larceny. . . .
>
> In the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses, duplicating state law which was adequate and effectively enforced, and the duplication of which would bring innumerable cases, most of them small, within the jurisdiction of federal prosecutors and courts. Congress was as aware in 1937 as it was in 1934, when it rejected the unambiguous provision making obtaining by false pretense from a bank of federal crime, that such an extension of federal law would serve no purpose except to confuse and dilute state responsibility for local crimes which were being adequately dealt with by state law. None of the reasons which persuaded the circuits and finally the Supreme Court to interpret broadly the word stolen in the motor vehicle act were present in 1937, when Congress wrote §2113, or are present today.

Having similarly relied extensively on the statute's legislative history, the Third Circuit, *United States v. Pinto,* 646 F.2d 833, cert. denied, 102 S.Ct. 94 (1981),[12] the Fourth Circuit, *United States v. Rogers,* 289 F.2d 433 (4th Cir. 1961), and the Sixth Circuit, *United States v. Feroni,* 655 F.2d 707 (6th Cir. 1981) have adopted a narrower construction of §2113(b). Although the actual holding in *Jerome* concerns the scope of the bank burglary provision in §2113(a), this Court took a view of the Bank Robbery Act and its legislative

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[12]In *United States v. Simmons,* 679 F.2d 1042, 1049 (3rd Cir. 1982) the court stated that the holding in *Pinto* was explicitly limited to the facts before the court at that time and that the language in that opinion which might be susceptible of a restrictive construction of 18 U.S.C. §2113(b) was at most dictum.

history that is consistent with a narrow interpretation of §2113(b).

In *Rogers,* the court stated:

> We accept the defendant's premise that paragraph (b) of the bank robbery act reaches only the offense of larceny as that crime has been defined by the common-law. It does not encompass the crimes of embezzlement from a bank, reached by another statute, or obtaining goods by false pretense. That this is so is indicated by the use of the words, "(w)hoever takes and carries away with intent to steal and purloin . . . ," borrowed from the Act of April 30, 1790, which had been construed as a larceny statute. It is further indicated by the title of the Act and its legislative history, *supra,* at 437.

Further evidence that 18 U.S.C. §2113 was never designed to be an all encompassing theft offense can be gleamed from the enactment of 18 U.S.C. §656 (dealing with embezzlement) and 18 U.S.C. §1025 (dealing with obtaining property by false pretenses upon any waters or vessels). The two crimes covered by these statutes have been traditionally distinguished from common-law larceny.

The government, pointing out that §1025 was enacted in response to the recommendation of the Attorney General, states the following:

> He stated in a letter to Congress that existing federal statutes applicable in that special federal jurisdiction—including, he stated, the statute prohibiting "larceny" 18 U.S.C. (1940 ed.) 466 (the present 18 U.S.C. 661)—did not reach "card sharping" offenses on the high seas. Thus, he explained, he was recommending the enactment of legislation to prohibit obtaining money by false pretenses on the high seas, which would include the activity of card sharps within its scope. See S. Rep. No. 446, 76th Cong., 1st Sess. 1 (1939).

The general federal larceny statute that was among the criminal statutes cited by the Attorney General as not covering the conduct in question was derived from a 1790 statute that was and is written in terms identical to Section 2113(b), applying to whoever "takes and carries away (property), with intent to steal or purloin." The enactment of Section 1025 in 1939 therefore might suggest that neither Congress nor the Attorney General in 1937 understood the identical language in Section 2113(b) (or the reference to that language as "larceny") to include false pretenses.[13]

POINT II

CANONS OF STATUTORY INTERPRETATION DO NOT SUPPORT THE CONCLUSION THAT 18 U.S.C. §2113(b) ENCOMPASSES MORE THAN COMMON-LAW LARCENY

Certain general principles of interpretation of criminal statutes have gained wide acceptance. The following clearly support Petitioner's contention that the court of appeals erred in its interpretation of §2113(b). Penal statutes have been held to be strictly construed, with ambiguities resolved in favor of leniency, *United States v. Enmons,* 410 U.S. 396, 411 (1973); *United States v. Quinn,* 514 F.2d 1250, 1254 (5th Cir. 1975). As to this principle the Fifth Circuit stated in *United States v. Sayklay,* 542 F.2d 942, 944 (5th Cir. 1976):

> The defendant's wrongful actions render her an undeserving candidate for application of the principle,

[13]Memorandum for the United States, 1982 Term, at 17-18.

> but doubtless most who require its assistance have been and will be undeserving. More is at stake here than convicting a wrongdoer of *something;* fidelity to Congress' clear purpose and refusal to convict anyone of a crime of which he has not been—and cannot be, on the facts—proved guilty.

This Court in *Turley, supra,* at 411-3 stated "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning. . . . Freed from a common-law meaning, we should give . . . the meaning consistent with the context in which it appears."

In *Williams v. United States,* 50 U.S.L.W. 4949, 4951 (1982), this Court stated "and, when interpreting a criminal statute that does not explicitly reach the conduct in question, we are reluctant to base an expansive reading on inferences drawn from subjective and variable 'understandings'." This Court further stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. *Id.,* at 4952.

This Court has stated in *Jerome, supra,* at 104-5 (1943):

> Since there is no common law offense against the United States . . . , the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection it should be noted that the double jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction based on the same acts has already been obtained. . . . That consideration gives additional weight to the view that

> where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute.

This Court has also stated that federal criminal jurisdiction cannot be extended by presumption; rather it could be done only through a clear expression in the statute.

Using the above canons of statutory interpretation, §2113(b) should not be so broadly construed as to encompass more than common-law larceny. Since the ambiguous term "steal" has no common-law meaning, the context in which it was used must be examined. The statute's legislative history clearly indicates that Congress did not intend false pretenses to be included. The court in *Le Master* stated that "in the bank situation we see no reason, urgent or otherwise, why Congress in 1937 should have wanted to enter the field of obtaining by false pretenses duplicating state law which was adequate and effectively enforced. . . ." *supra,* at 268. When Congress wanted a statute to reach the criminal act of false pretenses, it has often used the term "obtain," rather than "take and carry away."[14] Congress specifically covered other theft crimes in other sections of Title 18. As such, the court of appeals erroneously interpretated the meaning of §2113(b).

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[14]See, *e.g.* 18 U.S.C. §1025; La Fave & Scott, *supra,* at 655; Miller, *supra,* at 382.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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No. 82-5119

In the Supreme Court of the United States

OCTOBER TERM, 1982

NELSON BELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT UNIT B

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a taking of money by false pretenses from a federally insured bank violates 18 U.S.C. 2113(b).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals (J.A. 15-25) is reported at 678 F.2d 547. The panel's opinion (J.A. 6-13) is reported at 649 F.2d 281.

JURISDICTION

The judgment of the en banc court of appeals was entered on June 1, 1982 (J.A. 26-27). The petition for a writ of certiorari was filed on July 26, 1982, and was granted on November 29, 1982 (J.A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes or carries away, with intent to steal or purloin, any property or money or any

other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both[.]

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of taking money from a federally insured savings and loan association, in violation of 18 U.S.C. 2113(b). He was sentenced to imprisonment for one year. A divided panel of the court of appeals reversed (J.A. 6-13), but the en banc court of appeals vacated the panel opinion and affirmed petitioner's conviction (J.A. 15-25).

1. The evidence at trial, which is set out in the opinions below (J.A. 6-7, 16-17), established that on or about October 13, 1978, Lawrence and Elaine Rogovin mailed a $10,000 check from Cincinnati, Ohio, to their investment agent in Florida. The agent was to deposit the check into the Rogovins' savings account at the Dade Federal Savings and Loan Association. The agent never received the check.

A few days later, on October 17, 1978, petitioner opened an account at a Dade Federal branch office, using a false address, birth date, and social security number. Later that day, at a different branch of the bank, petitioner deposited the Rogovins' $10,000 check into his new account, giving a second false address. The Rogovins' account number had been scratched out and petitioner's new account number had been substituted in its place. After a 20-day hold-

ing period, but before the Rogovins discovered what had happened to their check, petitioner withdrew the $10,000 in cash, with accrued interest, from his account, giving a third false address.

2. A divided panel of the court of appeals reversed petitioner's conviction (J.A. 6-13). Although the court did not question the application of 18 U.S.C. 2113(b) to theft by false pretenses (J.A. 8), it held that the evidence was insufficient to prove that petitioner had a specific intent to steal the $10,000 from the bank when he withdrew the funds (J.A. 9-12).

The court of appeals granted rehearing en banc (J.A. 14), vacated the panel opinion, and affirmed petitioner's conviction (J.A. 15-27). With respect to the question on which this Court has granted review —whether 18 U.S.C. 2113(b) prohibits the obtaining of property from a bank by false pretenses—the majority of the en banc court adopted the earlier decision of the Fifth Circuit in *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966). In *Thaggard*, the Fifth Circuit relied upon this Court's decision in *United States* v. *Turley*, 352 U.S. 407, 417 (1957), in holding that Section 2113(b) embraces " 'all felonious takings . . . with intent to deprive the owner of the rights and benefits of ownership, regardless of whether or not the theft constitutes common-law larceny' " (J.A. 17, quoting *Thaggard*, 354 F.2d at 737).

Four judges dissented from this aspect of the en banc decision (J.A. 20-24). Relying principally on the Ninth Circuit's analysis of the statute and its legislative history in *LeMasters* v. *United States*, 378 F.2d 262, 267-268 (1967), the dissenters concluded that theft by false pretenses is beyond the reach of Section 2113(b).

SUMMARY OF ARGUMENT

A. In 18 U.S.C. 2113(b), Congress provided that "[w]hoever takes or carries away, with intent to steal or purloin," any money or property of value exceeding $100 from a federally chartered or insured bank or other financial institution, shall be guilty of a felony. If, as is usually the case, the words of the statute are to be given their common, ordinary meaning, then it would seem beyond dispute that petitioner's conduct was in violation of the statutory prohibition.

Petitioner argues, however, that because the phrase "takes and carries away" in Section 2113(b) is cast in terms similar to those used in the traditional formulation of common law larceny, it necessarily follows that Congress intended the statute to apply only to those offenses that would constitute larceny at common law. At common law, the offense of larceny required a "trespass," or nonconsensual acquisition of property from another. In this respect, larceny was distinct from false pretenses, in which the thief obtained property and title thereto with the consent of the owner, albeit a consent procured through false representation. If Congress meant this common law distinction to govern the construction of Section 2113(b), then petitioner's conduct did not violate the statute because he obtained the money with the consent—albeit fraudulently induced—of the bank.

Thus, the proper interpretation of the statute turns on whether Congress intended the words used to have their common, contemporary meaning, or the meaning attached to those words at common law. The use of the phrase "with intent to steal or purloin" in describing the scienter element of the offense suggests that Congress did not intend Section 2113(b) to be

limited to common law larceny, because the terms "steal" and "purloin" had no accepted common law meaning but instead were associated with a broader range of theft offenses than was "larceny" at common law.

B. Moreover, by the time Section 2113(b) was enacted in 1937 there was a growing trend, both in this country and in England, to do away with the artificial distinctions among different theft-related offenses (*e.g.*, larceny, larceny by trick, embezzlement and false pretenses) that had developed at common law. Thus, while the term "larceny" (and its classic "takes and carries away" formulation) had quite strictly defined content in earlier years, by 1937 larceny had begun to be regarded as a generic term connoting a broad range of theft-related crimes. In light of this background, it is difficult to believe that Congress deliberately employed common law terminology in Section 2113(b) for the specific purpose of resurrecting the arcane and illogical distinctions of the past.

C. 1. The sparse legislative history of Section 2113(b) is at best inconclusive and does not require rejection of the literal language of the statute. In 1934, the Attorney General proposed legislation that would have protected Federal Reserve System banks and banks organized or operated under federal law from robbery, burglary and theft. The theft provision would have included the "taking and carrying away" of the bank's property without the consent of the bank, or with consent obtained, *inter alia*, by means of any false or fraudulent representation, *i.e.*, false pretenses. This provision and the burglary provision were struck without explanation, however, and the legislation as enacted was limited to robbery.

In 1937, Congress expanded the coverage of the bank robbery statute to include larceny and burglary

of federally organized and insured banks. The larceny provision (now codified at 18 U.S.C. 2113(b)) does not expressly refer to false pretenses (as did the 1934 bill), but the mere use of the phrase "takes and carries away" in the text of the statute (and of the word "larceny" in the title of the bill and in the committee reports) does not necessarily establish an intent to exclude theft by false pretenses. In the Attorney General's 1934 bill, the theft provision included the formulation "takes and carries away" to describe both consensual and nonconsensual acquisitions of property. Thus, the inclusion of this formulation in Section 2113(b) may likewise have been intended to incorporate takings with or without the consent of the bank. This conclusion is buttressed by other evidence suggesting that by 1937 Congress no longer was concerned with the problems of gangsterism that had prompted passage of the limited bank robbery statute in 1934, but instead was concerned generally with protecting federally insured banks from the depletion of their assets as a result of nonforcible takings.

2. The decision of this Court in *Jerome* v. *United States*, 318 U.S. 101 (1943), does not compel the conclusion that the words used in Section 2113(b) should be given their common law meaning. Indeed, the Court's actual holding in *Jerome*—rejecting the argument that the burglary provision of the bank robbery statute embodied the common law definition of burglary—is not inconsistent with our position that the larceny provision is not limited by the common law definition of that offense. While certain language in *Jerome* and, to some extent, the Court's analysis of the legislative history of the statute suggest that Congress intended Section 2113(b) to be construed narrowly (*i.e.*, as limited to common law

larceny), they are not dispositive on the question of Congress' intent. The decision in *Jerome* was supported by other considerations that are not implicated in this case. Here, unlike in *Jerome*, if the words of the statute are given their ordinary meaning there is no danger either of disparate application of the statute in different jurisdictions, or of expansion of federal jurisdiction to all state felonies committed in banks.

3. Nor does the passage in 1939 of an entirely unrelated statute—18 U.S.C. 1025—shed light on Congress' intent in enacting Section 2113(b) two years earlier. It is true that, in proposing the enactment of Section 1025 to reach "card sharping" offenses on United States waters, the Attorney General suggested a narrow view of the general federal larceny statute (now codified at 18 U.S.C. 661), which was virtually identical in its language to Section 2113(b). However, Section 1025 was enacted hastily, without debate, and its passage does not demonstrate Congress' deliberate intent to maintain outmoded distinctions between common law larceny and false pretenses. Indeed, it is at least as reasonable to conclude that Congress acted out of an abundance of caution to ensure that, in the event the courts were to construe the larceny statute (which was derived from a 1790 statute) as limited to common law larceny, card sharps operating on United States waters would remain subject to federal prosecution. Furthermore, shortly after Congress enacted Section 1025, it enacted a broad theft statute relating to investment companies, which equated "larceny" with offenses outside the purview of the common law crime. See 15 U.S.C. 80a-36. The enactment of this statute casts considerable doubt on any attempt to discern Con-

gress' intent as to Section 2113(b) by reference to 18 U.S.C. 1025.

D. A construction of Section 2113(b) that limits its scope to common law larceny would perpetuate the technical and illogical distinctions between various theft offenses that developed largely as a result of historical accidents. Thus, under petitioner's view, the statute would cover larceny by trick, where the thief fraudulently induces the owner to part with *possession* of the property, but not false pretenses, where the thief fraudulently induces the owner to part with *title* to the property. Such incongruous results would be avoided if the words of the statute are given their common, everyday meaning.

E. This case presents no occasion for applying the "rule of lenity." Because the meaning of Section 2113(b) can be ascertained with reasonable certainty, there is no ambiguity requiring curtailment of its literal coverage. Thus, this case is distinguishable from *Williams* v. *United States*, No. 80-2116 (June 29, 1982), slip op. 7, where the Court applied the rule of lenity to a statute that "does not explicitly reach the conduct in question."

ARGUMENT

18 U.S.C. 2113(b) PROHIBITS THE TAKING OF MONEY BY FALSE PRETENSES FROM A FEDERALLY INSURED BANK

The sole question presented by this case is whether 18 U.S.C. 2113(b) is restricted in its coverage to offenses that were embraced in the common law by the term "larceny." Petitioner would answer that question in the affirmative; accordingly, he contends that Section 2113(b) does not encompass theft of property by "false pretenses." Under common law,

the crime of false pretenses traditionally was distinguished from larceny by the fact that the latter required a trespassory or nonconsensual acquisition of the property from another, while in false pretenses the property and title thereto were acquired with the consent of the other party, albeit a consent procured by false or fraudulent representations. See, *e.g.*, W. LaFave & A. Scott, *Criminal Law* 618, 622, 655 (1972); 2 W. Burdick, *The Law of Crime* 286 (1946); J. Miller, *Criminal Law* 340-341, 348-382, 390 (1934). If the distinction were followed in this case, petitioner's conduct would constitute false pretenses, not larceny, at least as larceny was defined at common law, because petitioner's withdrawal of the money from his account was with the consent of the bank, albeit a consent procured by his fraudulent conduct. It is our basic submission in this case that the common law distinction between larceny and false pretenses, while perhaps of interest to legal historians, is not determinative of the proper scope of the offense defined by Congress in Section 2113(b).

A. The Literal Language Of Section 2113(b) Includes A Taking By False Pretenses

1. Section 2113(b) provides that "[w]hoever takes and carries away, with intent to steal or purloin," any money or property of value exceeding $100, belonging to or in the possession of a federally chartered or insured bank or other financial institution, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both. Petitioner's conduct in this case certainly falls within the literal terms of this language.[1] When petitioner withdrew the $10,000

[1] There is no dispute that the institution involved here, the Dade Federal Savings and Loan Association, is a protected institution under the statute.

plus interest from his account, he can be said to have "taken" the money from the teller who paid the money over to him; when petitioner left the bank, he "carried away" the money; and it seems clear that petitioner did these acts "with intent to steal or purloin" the money, in the sense that he intended to deprive the bank or the true owner of the use or benefit of the funds.[2]

It is "[a] fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). Section 2113(b) does not include a definition of the operative words used in the statute.

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[2] In accordance with the literal language of the statute, the district court instructed the jury that, in order to find petitioner guilty under Section 2113(b), it had to find (Tr. 188):

> First: The act or acts of taking from the person or presence of another, any property or money belonging to, or in the possession of a bank or savings and loan association as charged;
>
> Second: That [petitioner] do so willfully and with specific intent to steal or purloin;
>
> Third: That [petitioner] did take and carry away money exceeding $100.

The court then instructed that (Tr. 189):

> The word "purloin" as used in Section 2113(b) of the United States Code and in this charge means simply to commit larceny or theft.
>
> Within the meaning of Section 2113(b) of Title 18 of the United States Code, the terms "steal" and "purloin" would include the conduct of an accused that was designed and did result in his intentionally receiving from a federal savings and loan association money that he knew he was not entitled to receive.

Petitioner did not object to these instructions (Tr. 162-163, 194).

In these circumstances, it is perfectly reasonable to conclude—as did the court below and the majority of other courts of appeals that have considered the question—that Congress intended the words of Section 2113(b) to be given their ordinary meaning.[3] Under this approach petitioner's conduct clearly was prohibited by the statute.

2. Petitioner contends, however, that because the phrase "takes and carries away" in Section 2113(b) is cast in terms "that are similar to those used in the traditional formulation of common-law larceny" (Pet. Br. 5-6), it necessarily follows that Congress did not mean to extend the reach of the statute to conduct that would constitute false pretenses at common law. In support of this contention, petitioner relies (Br. 15) on the principle that "where a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning."

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[3] The decision below, which follows the Fifth Circuit's decision in *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966), is in accord with the decisions of a majority of the courts of appeals that have considered the question. See *United States* v. *Fistel*, 460 F.2d 157, 162-163 (2d Cir. 1972); *United States* v. *Guiffre*, 576 F.2d 126, 127-128 (7th Cir.), cert. denied, 439 U.S. 833 (1978); *United States* v. *Shoels*, 685 F.2d 379, 381-383 (10th Cir. 1982), petition for cert. pending, No. 82-5550; *United States* v. *Simmons*, 679 F.2d 1042, 1045-1046 (3d Cir. 1981), petition for cert. pending *sub nom. Brown* v. *United States*, No. 82-5201. Cf. *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978) (dictum). Several other courts have reached a contrary result. See *United States* v. *Feroni*, 655 F.2d 707, 709-711 (6th Cir. 1981); *LeMasters* v. *United States*, 378 F.2d 262, 263-268 (9th Cir. 1967). Cf. *United States* v. *Rogers*, 289 F.2d 433, 437-438 (4th Cir. 1961) (dictum).

United States v. *Turley*, 352 U.S. 407, 411 (1957) (footnote omitted). See also *Morissette* v. *United States*, 342 U.S. 246, 263 (1952); *Standard Oil Co.* v. *United States*, 221 U.S. 1, 59 (1911).

Petitioner's argument rests on the proposition that Section 2113(b), although literally applicable to his conduct, employs terms of art with an established common law meaning that is at odds with the contemporary meaning of the words in the statute. But other language in the statute provides evidence that Congress did not intend to limit the offense described therein to common law larceny. The phrase following the "takes and carries away" element of the offense described in Section 2113(b)—"with intent to steal or purloin"—describes the wrongful intent with which the criminal act must be performed in order for the actor to be guilty of the offense. As this Court observed in *United States* v. *Turley*, *supra*, 352 U.S. at 411-412, the term "steal" had no accepted common law meaning and was never equated with larceny. See *Factor* v. *Laubenheimer*, 290 U.S. 276, 303 (1933); *United States* v. *Armata*, 193 F. Supp. 624, 626 (D. Mass. 1961) (Wyzanski, J.). Similarly, the term "purloin," which was not included in the common law definition of larceny (see *LeMasters* v. *United States*, 378 F.2d 262, 264 (9th Cir. 1967)), is virtually synonymous with "steal" and encompasses a broader range of theft offenses than common law larceny. See *United States* v. *Johnson*, 575 F.2d 678, 679-680 (8th Cir. 1978). The use of terms without an established common law meaning in describing the scienter element of the offense thus suggests that the remaining words used in Section 2113(b) should not be limited to their common law meaning. See Note, *Determining The Proper Scope of Section 2113(b) of*

the Federal Bank Robbery Act, 51 Fordham L. Rev. 536, 543-546 (1982).

Moreover, the Court has recently rejected the notion that the common law meaning of the words used is invariably controlling in construing a modern federal statute. In *Perrin* v. *United States*, *supra*, the Court unanimously concluded that the term "bribery" in the Travel Act, 18 U.S.C. 1952, included commercial bribery and was not limited to bribery of public officials, to which the term had been limited at common law. The Court observed (444 U.S. at 43) that "by the time the Travel Act was enacted in 1961, federal and state statutes had extended the term bribery well beyond its common-law meaning," and it relied on this background in construing the statutory language in accordance with its common understanding and meaning at the time of the statute's enactment. Similarly, in *United States* v. *Nardello*, 393 U.S. 286 (1969), this Court unanimously dismissed the claim that the term "extortion" in the Travel Act should be limited to its common law definition. Noting that prior to 1961 the crime of extortion had been statutorily expanded in many states beyond its common law meaning (*id.* at 289-290), the Court concluded that Congress used the term in a generic and contemporary sense.[4] Here, too, by the time Section 2113(b) was enacted in 1937, the common law definition of larceny had been extended by statute as part of a growing trend to eliminate the illogical distinc-

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[4] In both *Perrin* (444 U.S. at 45-47) and *Nardello* (393 U.S. at 290-293) the Court concluded that the legislative history of the Travel Act also supported a contemporary construction of the words of the statute. We discuss the legislative history of Section 2113(b) at pages 22-29, *infra*.

tions that had developed at common law among various theft-related offenses.

B. The Offense Described In Section 2113(b) Should Not Be Construed As Limited By The Common Law Definition Of Larceny Because By The Time The Statute Was Enacted There Was An Emerging Trend To Expand The Concept Of Larceny Beyond The Bounds Of The Common Law Offense

1. At common law, larceny was generally defined as the felonious taking and carrying away of the personal goods of another with intent to deprive the owner permanently of his property. See, *e.g.*, 4 W. Blackstone, *Commentaries* *229, *232; 2 W. Burdick, *supra*, at 258-263. The offense originally was fashioned to prevent breaches of the peace triggered by an owner's discovery that a thief had carried away his property. Accordingly, larceny was defined in early times as the taking and carrying away of movable property or livestock "against the peace." J. Hall, *Theft, Law and Society* 6 (2d ed. 1952). A "trespass," or nonconsensual taking from the victim's possession, was thus an essential element of larceny. See W. LaFave & A. Scott, *supra*, at 618-619; Scurlock, *The Element of Trespass in Larceny at Common Law*, 22 Temp. L. Q. 12, 14-15 (1948). In order to deter breaches of the peace, the common law classified larceny as a capital offense. See W. Clark & W. Marshall, *A Treatise on the Law of Crimes* 8 (5th ed. 1952).

Over the centuries, the scope of the offense encompassed by the term "larceny" was subject to significant modification, although the common law formulation of larceny retained its classic language. For example, under the earliest applications of the doctrine of trespass, a bailee could not commit a larceny by appropriating the owner's goods that previously had

been entrusted to his possession. In the 15th Century, however, the concept of larceny was expanded to embrace a bailee's "breaking bulk"—*i.e.*, breaking open a container and appropriating all or part of its contents—even though the bailee had acquired the property with the owner's consent and his act of appropriating the goods did not create an immediate threat to the peace. *Carrier's Case*, Y.B. 13 Edw. IV f. 9, pl. 5 (1473).[5] Approximately 300 years later, after more enlightened penology had mandated less severe punishment for larceny, the concept of "larceny by trick" was fashioned as a legal fiction to enable prosecution for larceny where the owner was deceived into giving up possession (but not title) voluntarily. *Rex* v. *Pear*, 2 East P.C. 686, 1 Leach 212, 168 Eng. Rep. 208 (1779). See J. Hall, *supra*, at 40-45; W. LaFave & A. Scott, *supra*, at 620.

At the same time, the acquisition of title to property with the consent of the owner but on the basis of a false representation—long viewed as merely a private injury subject to redress by civil action only—became subject to prosecution under false pretenses statutes. See W. LaFave & A. Scott, *supra*, at 621 & n.11; W. Clark & W. Marshall, *supra*, at 443-446, 504-505, 508-509. Technically, however, theft by false pretenses was regarded as distinct from common law larceny because it involved a consensual transfer of title to the thief, albeit a consent wrongfully obtained through fraudulent representation of fact.

2. In more recent times, there was a growing realization that the traditional distinctions between common law larceny and related offenses such as theft by

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[5] See J. Hall, *supra*, at 3-39, for a thorough discussion of *Carrier's Case* and its impact on the development of the law of larceny.

false pretenses was a product, not of reasoned legal theory, but of "historical accidents in the development of the criminal law, coupled, perhaps, with an unwillingness on the part of the judges to enlarge the limits of a capital offense." *Commonwealth* v. *Ryan*, 155 Mass. 523, 527, 30 N.E. 364, 365 (1892) (Holmes, J.) (discussing the distinction at common law between embezzlement and larceny).[6] One legal historian has noted in this connection that "[t]he thrust of the law

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[6] The "historical accidents" that shaped the development of the law of theft-related offenses is described in W. LaFave & A. Scott, *supra*, at 621 (footnote omitted), quoting from Model Penal Code art. 206, App. A, at 102 (Tent. Draft No. 1, 1952):

> It may be wondered why the English judges, who did not hesitate, in the face of need, to invent murder and manslaughter, burglary and arson, robbery and larceny and other crimes, hesitated during the late 1700's to expand larceny to include the areas of embezzlement and false pretenses. The commentary to the Model Penal Code explains the matter in a nutshell as follows: "At this point in the chronology of the law of theft, about the end of the 18th century, a combination of circumstances passed the initiative in the further development of the criminal law from the courts to the legislature. Among these circumstances were the general advance in the prestige and power of the English Parliament; the conversion of the idea of 'natural law' from an instrument for judges' defiance of monarchy to a restraint upon the judges themselves, making them interpreters of immemorial custom rather than framers of policy; and, perhaps most direct influence of all, a revulsion against capital punishment which was the penalty for all except petty larceny during much of the 18th century. The savagery of this penalty not only would cause a judge to hesitate to enlarge felonious larceny, but is sufficient to account for the host of artificial limitations which they engrafted on that crime * * *."

for the last two centuries has been toward transcendence of these historical 'accidents' and the creation of a unified law of theft offenses." Fletcher, *The Metamorphosis of Larceny*, 89 Harv. L. Rev. 469, 470 (1976) (footnote omitted). Thus, when 18 U.S.C. 2113(b) was enacted, the "highly technical [distinctions] which shaped the common law as to 'trespass' or 'taking' " (*Skinner* v. *Oklahoma*, 316 U.S. 535, 539 (1942)) had been abandoned in England and in a number of the states and had been replaced by statutes creating generic theft offenses. See *Morissette* v. *United States*, *supra*, 342 U.S. at 272-273 & nn. 32, 33. In light of this background, it is extremely unlikely that Congress in 1937 deliberately employed common law terminology for the specific purpose of incorporating into the bank larceny statute arcane and anachronistic distinctions that had long since lost their vitality.

a. In the early years of the Republic, the criminal laws of the states reflected the technical distinctions of the common law; these distinctions resulted in the creation of separate offenses for each of the different common law forms of theft: larceny, false pretenses and embezzlement. The existence of these separate offenses, which were " 'very largely dependent upon history for explanation' " (*Skinner* v. *Oklahoma*, *supra*, 316 U.S. at 542, quoting O. Holmes, *The Common Law* 73 (1881)), too often resulted in unnecessary acquittals solely because of defects in pleadings.

Several respected commentators were strongly critical of the perpetuation of the common law distinctions between the various forms of theft-related offenses. In an address delivered in 1897, Justice Holmes pointed to the law of larceny as an example of an unreasoned adherence to anachronistic rules of the common law:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

* * * * *

Let me take an illustration, which can be stated in a few words, to show how the social end which is aimed at by a rule of law is obscured and only partially attained in consequence of the fact that the rule owes its form to a gradual historical development, instead of being reshaped as a whole, with conscious articulate reference to the end in view. We think it desirable to prevent one man's property being misappropriated by another, and so we make larceny a crime. The evil is the same whether the misappropriation is made by a man into whose hands the owner has put the property, or by one who wrongfully takes it away. But primitive law in its weakness did not get much beyond an effort to prevent violence, and very naturally made a wrongful taking, a trespass, part of its definition of the crime. In modern times the judges enlarged the definition a little by holding that, if the wrongdoer gets possession by a trick or device, the crime is committed. This really is giving up the requirement of a trespass, and it would have been more logical, as well as truer to the present object of the law, to abandon the requirement altogether. That, however, would have seemed too bold, and was left to statute. Statutes were passed making embezzlement a crime. But the force of tradition caused the crime of embezzlement to be regarded as so far distinct from larceny that to this day, in some jurisdictions at least, a slip corner is kept open for thieves to contend, if indicted for lar-

> ceny, that they should have been indicted for embezzlement, and if indicted for embezzlement, that they should have been indicted for larceny, and to escape on that ground.

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469-470 (1897).[7]

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[7] Other commentators expressed similar sentiments. One author wrote:

> The boundary line separating these three offenses [common law larceny, embezzlement, and false pretenses] is often too difficult to ascertain in advance * * *. The result is that when the District Attorney has charged one of these crimes, the defendant often secures an acquittal by proving his guilt of one of the others. There may be some who believe the subtle distinctions in these crimes inherent in the nature of things, but it is submitted that their existence is entirely due to accidental, historical causes, and their perpetuation is a disgrace.

Kidd, *Larceny By Trick: False Pretenses*, 2 Calif. L. Rev. 334, 335 (1914), quoted in J. Miller, *supra*, at 374.

Another writer expressed similar criticisms of the fine distinctions that had developed at common law:

> No more unseemly spectacle can exist in a court of justice than that of a defendant admittedly guilty of some sort of theft (in the broad sense of the term) who must, nevertheless, either go free or receive a new trial, merely because the particular character of his theft has not been properly set forth in the indictment.

Note, *Larceny, Embezzlement and Obtaining Property by False Pretenses*, 20 Colum. L. Rev. 318, 323 (1920) (footnote omitted). Noting that Massachusetts had sought to remedy this problem by enacting legislation making common law larceny, embezzlement, and obtaining property by false pretenses a single crime under the generic label "larceny," this writer stated:

> Nothing can be more admirable than the simplicity, ingenuity and fairness of this masterly legislation which

b. In response to these concerns, prior to 1937 a number of states had enacted statutes that did away with the common law distinctions. Indeed, as early as 1898, this Court recognized that "the common law definition of larceny has been largely extended by statute in almost every State in the Union." *Jolly* v. *United States*, 170 U.S. 402, 407. By 1937, several states had merged false pretenses, embezzlement and larceny into a single generic larceny or theft offense.[8] While still maintaining the common law distinctions in their statutes, several other states provided that a defendant charged with false pretenses could not escape conviction on the ground that the proof showed the commission of common law larceny.[9]

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fully protects the rights of the accused, while at the same time it does away with wasting the time of the court in deciding subtleties of law, which, far from being of any practical use, are a positive impediment to justice.

Id. at 324.

[8] See, *e.g.*, Cal. Penal Code § 484, as amended by Cal. Stat. ch. 619, § 1 (1927); Mass. Gen. Laws ch. 266, § 30 (1932); Minn. Stat. ch. 101, § 10358 (1927); Mont. Rev. Code ch. 43, § 11368 (1935); N.Y. Penal Law § 1290 (Gilbert 1937); R.I. Gen. Laws tit. 39, ch. 397, §§ 15, 16 (1923); Wash. Rev. Stat. tit. 14, § 2601 (1932).

[9] See, *e.g.*, Ark. Stat. ch. 42, § 3075 (1937); Del. Rev. Code ch. 150, § 37 (1935); Ill. Rev. Stat. ch. 38, § 253 (1935); Md. Ann. Code art. 27, § 139 (1924); N.C. Code Ann. ch. 82, art. 17, § 4277 (1931); Pa. Stat. tit. 18, § 2631 (Purdon 1936); S.C. Code § 1171 (1932); Va. Code Ann. § 4440 (1924); W. Va. Code Ann. § 5965 (1932).

In addition, other states, while maintaining the common law distinctions in pleading and proof, recognized that the distinctions in punishment were no longer valid and provided that the penalty for false pretenses would be equivalent to the penalty for larceny. See Idaho Code Ann. ch. 39, § 17-3902

The clear purpose of these and like statutes was "to avoid gaps and loopholes between offenses" (*Morissette* v. *United States*, *supra*, 342 U.S. at 273) and thus avert the spectacle of guilty individuals "escap-[ing] through the breaches." *Id.* at 271. As the Court explained in *Morissette* (*ibid.*):

> The books contain a surfeit of cases drawing fine distinctions between slightly different circumstances under which one may obtain wrongful advantages from another's property. The codifiers [of generic larceny-type offenses] wanted to reach all such instances.

See also *Crabb* v. *Zerbst*, 99 F.2d 562, 564 (5th Cir. 1938) ("the modern tendency is to broaden the offense of larceny, by whatever name it may be called, to include such related offenses as would tend to complicate prosecutions under strict pleading and practice").[10]

(1932); Kan. Stat. Ann. § 21-551 (1935); Mo. Rev. Stat. § 4095 (1929); Tex. Stat. tit. 17, art. 1549 (Vernon 1936); Utah Rev. Stat. § 103-18-8 (1933).

Today, the Model Penal Code and the penal laws of most states have abrogated these distinctions by enacting generic theft or larceny statutes. See Note, *supra*, 51 Fordham L. Rev. at 558 & n.132.

[10] The state courts recognized that the effect of these modern theft statutes was to do away with the technical distinctions that had developed at common law. See, *e.g.*, *Commonwealth* v. *King*, 202 Mass. 379, 388, 88 N.E. 454, 458 (1909) ("the former crimes of larceny, embezzlement, and the obtaining of property by false pretenses, are now merged into the one crime of larceny as defined by * * * statute[ ]"); *Van Vechten* v. *American Eagle Fire Insurance Co.*, 239 N.Y. 303, 306, 146 N.E. 432, 433 (1925) (Cardozo, J.) ("[l]arceny, in our law of crimes, includes the offense of obtaining property by false pretenses").

Thus, while at one time the term "larceny" (and its classic formulation) had quite limited connotations, by 1937 larceny had begun to be regarded as a generic term connotating a broad range of theft-related offenses. Against this background of a growing movement toward abandonment of the common law distinctions between larceny and related crimes, it is difficult to believe that Congress, in enacting Section 2113(b), deliberately disregarded contemporary developments in order to resurrect the arcane and illogical distinctions of the past. Indeed, in *Prince* v. *United States*, 352 U.S. 322, 324 n.2 (1957), this Court expressed its understanding that the offense described in Section 2113(b) extends beyond the bounds of common law larceny, when it noted that its use of the terms "robbery" and "larceny" in connection with Section 2113 "refer not to the common-law crime, but rather to the analogous offenses in the Bank Robbery Act."

Petitioner nonetheless contends (Br. 5-14) that the legislative history of Section 2113(b) compels the conclusion that Congress did intend to limit the coverage of the statute to conduct that would have constituted common law larceny. It is to this contention that we now turn.

C. The Legislative History Of Section 2113(b) Is Inconclusive And Does Not Compel Rejection Of The Literal Language Of The Statute

1. The sparse legislative history of Section 2113 was reviewed by this Court in *Jerome* v. *United States*, 318 U.S. 101, 102-104 (1943).

a. Prior to 1934, banks organized under federal law were protected against embezzlement (Rev. Stat. 5209, 40 Stat. 972), but not robbery, burglary, or larceny, which were punishable only under state

law. By 1934, concern was expressed about the activities of gangsters who operated habitually from one state to another in robbing banks, and about the fact that state authorities frequently were unable to cope with the problem. *Jerome*, 318 U.S. at 102, citing H.R. Rep. No. 1461, 73d Cong., 2d Sess. 2 (1934); see also S. Rep. No. 537, 73d Cong., 2d Sess. 1 (1934).

The Attorney General responded to this problem by proposing legislation (S. 2841, 73d Cong., 2d Sess. (1934)) that would have prohibited robbery (§ 4), burglary (defined as the breaking into a bank with intent to commit an offense defined by the bank-robbery statute or to commit any felony under federal or state law) (§ 3), and theft (§ 2). The latter section would have provided criminal sanctions for whoever "takes and carries away" property belonging to or in the possession of a bank "(1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation." This latter clause plainly would have applied to petitioner's conduct in this case. The 1934 bill passed the Senate in this form. However, the House Judiciary Committee struck Sections 2 and 3 without explanation,[11] and

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[11] Both the petitioner and the government in *Jerome* suggested that deletion of these provisions may have been attributable to Representative Sumners, the Chairman of the House Judiciary Committee, who, it was said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative." *A Note on the Racketeering, Bank Robbery, and "Kick-Back" Laws*, 1 Law & Contemp. Probs. 445, 448-449 (1934), quoted in Brief for the United States at 18 & n.16, *Jerome* v. *United States* (No. 325, 1942 Term) and Brief for Petitioner at 19-

the bill was enacted without them, applying principally to robbery. Act of May 18, 1934, ch. 304, 48 Stat. 783. See *Jerome*, 318 U.S. at 103.

b. "The limitation of the 1934 Act to robbery permitted individuals who stole money from federally insured banks, other than by the use of force or violence, to escape federal prosecution. The bank, the ultimate beneficiary of the Act, was nonetheless injured as if it had been robbed." Note, *supra*, 51 Fordham L. Rev. at 548-549 (footnotes omitted). The 1937 amendments to the bank robbery statute were intended to alleviate such anomalies.

In 1937, the Attorney General recommended amendment of the bank robbery statute "to include larceny and burglary" of banks. *Jerome*, 318 U.S. at 103, quoting H.R. Rep. No. 732, 75th Cong., 1st Sess. 1 (1937). The Attorney General explained that the limitation of the statute to robbery had produced "some incongruous results"—a "striking instance" of which was a situation in which a man had managed to gain possession of a large sum of money in the

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20, *Jerome* v. *United States* (No. 325, 1942 Term). When asked whether the legislation should not also apply to governmental institutions other than banks, Representative Sumners stated: "[W]e are going rather far in this bill, since all the property is owned, as a rule, by the citizens of the community where the bank is located. The committee was not willing to go further, and the Attorney General did not ask it to go further." 78 Cong. Rec. 8133 (1934).

There is no suggestion in the legislative record or elsewhere, however, that the House Committee deleted the larceny provision because of objections to creation of a broad larceny or theft offense that would have disregarded the common law distinctions. At all events, we submit that Congress' failure to enact the 1934 bill in full as proposed "is entitled to no significance. The proposed [legislation] * * * [was] never voted down." *United States* v. *Turley*, *supra*, 352 U.S. at 415 n.14.

momentary absence of a bank employee, without displaying force or violence or putting anyone in fear, as required for the offense of robbery. H.R. Rep. No. 732, *supra*, at 1-2. The example cited by the Attorney General would have constituted larceny at common law because the property was taken without the consent of the bank, but there is nothing in the legislative history that suggests that the proposed amendment was meant to be limited to larceny as that crime was defined at common law.

The Attorney General's 1937 bill was enacted in essentially the same form as introduced. Act of Aug. 24, 1937, ch. 747, 51 Stat. 749.[12] True, the larceny provision of that bill, which became what is now 18 U.S.C. 2113(b), did not expressly refer to false pretenses, as did the Attorney General's 1934 proposal and the contemporary state statutes that had expanded the definition of larceny beyond its common law scope (see pages 20-21, *supra*); but the mere use of the phrase "takes and carries away" in the text of the legislation and of the word "larceny" both in the title of the bill and in the committee reports does not necessarily establish an intent to exclude theft by false pretenses. The 1937 enactment, in addition to omitting the specific reference to false pretenses that had been in the 1934 bill proposed by the Attorney General, also omitted the language "without the consent of such bank" that described a trespassory taking, which was an essential element of common law larceny. Moreover, in the Attorney General's 1934 proposal, the theft section provided that whoever "takes and carries away" property *with or without the con-*

[12] The provision relevant here was amended on the House floor to provide misdemeanor sanctions for cases involving theft of less than $50 and felony sanctions for cases involving $50 or more. 81 Cong. Rec. 5376-5377 (1937).

sent of the bank was guilty of an offense. The use of the identical phrase "takes and carries away" in what was referred to as the "larceny" provision of the bill proposed by the Attorney General and enacted by Congress in 1937 therefore likewise could have been intended to incorporate both consensual and nonconsensual takings and therefore to apply to the theft by false pretenses involved here. In this regard, this Court in *Jerome* referred to the theft provision of the 1934 bill as "dealing with larceny" (318 U.S. at 103), despite the language covering the taking of property with the fraudulently obtained consent of the bank, and the opinion elsewhere referred to this provision of the 1934 bill as having "defined larceny to include larceny by trick or fraud" (318 U.S. at 105).[13]

c. During its consideration of the 1937 legislation, Congress did not express any views one way or the other on whether the bill was meant to be a codification of common law larceny. The fact that there was no reference in the reports or debates to the concern about the problems of gangsterism that had prompted passage of the 1934 bank robbery statute suggests, however, that "Congress had expanded the scope of its

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[13] Moreover, to the extent that the 1934 bill can be viewed as reflecting Congress' understanding of the common law distinctions between consensual and nonconsensual takings, its structure reflects an unfamiliarity with the arcane distinctions of the common law. Thus, Section 2 distinguished between a nonconsensual taking and a taking with consent "obtained * * * by any *trick*, artifice, fraud, or false or fraudulent representation" (emphasis added). At common law, however, it was well established that larceny by trick was classified as larceny, which required a nonconsensual taking. See, *e.g.*, J. Hall, *supra*, at 40-45; W. LaFave & A. Scott, *supra*, at 620. This suggests the unlikelihood that Congress deliberately set out to codify common law larceny when it enacted Section 2113(b) three years later.

concern with respect to taking property or money from banks." *United States* v. *Simmons*, 679 F.2d 1042, 1048 (3d Cir. 1982), petition for cert. pending *sub nom. Brown* v. *United States*, No. 82-5201. See Note, *supra*, 51 Fordham L. Rev. at 553, 555, 558-559, 562. It should be kept in mind, in this regard, that the provisions of Section 2113(b) were enacted during the Depression, following the establishment of the Federal Deposit Insurance Corporation to guarantee bank deposits. Indeed, at the same time it created the FDIC in 1935, Congress amended the bank robbery statute—which, as originally enacted in 1934, covered only member banks of the Federal Reserve System and banks organized or operating under federal law (48 Stat. 783)—to protect banks insured by the FDIC. Act of Aug. 23, 1935, ch. 614, Section 333, 49 Stat. 720. In enacting Section 2113(b) two years later, Congress may thus have sought to expand the protection afforded to the federally insured assets of the Nation's banks. See *United States* v. *Marrale*, 695 F.2d 658, 663-664 (2d Cir. 1982).

Furthermore, as the court in *Simmons* explained (679 F.2d at 1048), "although subsequent legislative history must be used with caution in attempting to derive the intent of an earlier Congress, * * * the subsequent amendments to § 2113(b) manifest a consistent attempt by Congress to expand rather than restrict the scope of that provision." These amendments clearly reflect Congress' intent to protect banks from depletion of their federally insured assets. In 1940, Congress amended the bank robbery statute to make it a federal crime to "receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of [the other provi-

sions of the statute]." Act of June 29, 1940, ch. 455, 54 Stat. 695.[14] Congress subsequently enacted a series of amendments to Section 2113, expanding the coverage of the statute to financial institutions that previously were not within its provisions.[15] "This legislative history demonstrates that Congress' concern had expanded beyond the 'gangsterism' referred to in the legislative history of the original 1934 Act and that thereafter Congress' concern was directed at least in part to the federal government's potential obligation as an insurer to reimburse various financial institutions if they were to become victims of offenses covered by § 2113." *United States* v. *Simmons*, *supra*, 679 F.2d at 1048.[16]

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[14] This provision, as subsequently modified, is currently codified at 18 U.S.C. 2113(c).

[15] Act of Aug. 3, 1950, ch. 516, 64 Stat. 394 (federally insured savings and loan associations); Act of Apr. 8, 1952, ch. 164, 66 Stat. 46 (building and loan associations, homestead associations and federally insured state cooperative banks); Act of Sept. 22, 1959, Pub. L. No. 86-354, Section 27(2), 73 Stat. 639 (federal credit unions); Act. of Oct. 19, 1970, Pub. L. No. 91-468, Section 8, 84 Stat. 1017 (federally insured credit unions).

[16] The Ninth Circuit's analysis of the legislative history in *LeMasters* v. *United States*, *supra*, on which petitioner relies (Br. 11-12), is based on the erroneous view that, in enacting Section 2113(b) in 1937, Congress was concerned solely with the problem of gangsterism that had led to the passage of the 1934 statute. The fact that Section 2113(b) applies to nonforcible takings strongly suggests, however, that the bank larceny provision was meant to deal with a broader range of concerns than those addressed in 1934. See also *United States* v. *Marrale*, *supra* (principal goal of bank robbery statute is to protect financial institutions in which the federal government has an interest); *Way* v. *United States*, 268 F.2d 785, 786 (10th Cir. 1959) (purpose of Section 2113(b) is to safeguard the stability and integrity of federal banks).

In short, the legislative history of Section 2113(b) is at most inconclusive. That history provides no firm basis for concluding that when Congress used the phrase "takes and carries away" in Section 2113(b) and attached the label "larceny" to that provision, it thereby intended to confine the statute to larceny as understood at common law.

2. Petitioner contends, however, that this Court's decision in *Jerome* v. *United States*, *supra*, supports the view that the language of Section 2113(b) should be given its common law meaning. Although petitioner concedes that "the actual holding in *Jerome* concerns the scope of the bank burglary provision in § 2113(a)," he asserts that the Court in that case "took a view of the Bank Robbery Act and its legislative history that is consistent with a narrow interpretation of § 2113(b)" (Pet. Br. 12-13).

The issue directly involved in *Jerome* was whether the prohibition in the bank burglary provision, which as originally enacted prohibited entering a bank with the intent to commit "any felony or larceny," applied to an entry to commit a felony as defined under state law. See 318 U.S. at 101-102. Jerome, a captain in the Army, had forged the signature of another officer as a co-signer of a note in order to obtain a $400 loan, on which he subsequently defaulted. The uttering of a forged promissory note was a felony under state law, and Jerome was charged with the federal offense of entering the bank to commit that state felony.

This Court held that the term "any felony" in the bank burglary provision did not include state felonies but instead included only federal felonies affecting banks. 318 U.S. at 107-108.[17] In reaching this con-

[17] This holding was incorporated by Congress in the 1948 revision of Title 18, when Congress changed the relevant

clusion, the Court observed that the bill proposed by the Attorney General in 1934 would have expressly prohibited entering a bank to commit a felony under federal or state law and also "defined larceny to include larceny by trick or fraud" (318 U.S. at 105)—a reference to the theft offense described in Section 2 of the Attorney General's 1934 proposal (see page 23, *supra*). But, the Court noted, these proposals were not in the end incorporated in the 1934 Act, and the 1937 bill "did not renew the earlier proposals to include them" (318 U.S. at 105) but instead took a "selective" approach (*id.* at 107).[18] The Court found it "difficult to conclude" that Congress, having rejected express language in the bank burglary provision in 1934 covering entries to commit state felonies, "reversed itself in 1937, and, through the phrase 'any felony or larceny' adopted the penal provisions of forty-eight states with respect to acts committed in national or insured banks" (*id.* at 105-106). The Court then continued: "It is likewise difficult to believe that Congress, through the same clause, adopted by indirection in 1937 much of the fraud provision which it rejected in 1934. Cf. *United States* v. *Patton*, 120 F.2d 73" (318 U.S. at 106).[19]

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language in what is now Section 2113(a) from "any felony or larceny" to read "any felony affecting such bank * * * and in violation of any statute of the United States, or any larceny * * *." See H.R. Rep. No. 304, 80th Cong., 1st Sess. A-135 (1947).

[18] See also *Prince* v. *United States*, *supra*, 352 U.S. at 327 ("The only factor stressed by the Attorney General in his letter to Congress [in 1937] was the possibility that a thief might not commit all the elements of the crime of robbery").

[19] In *United States* v. *Patton*, 120 F.2d 73 (3d Cir. 1941), cited by the Court in the passage quoted, the defendant was employed as a clerk for a company that had a petty cash

The last-quoted passage indicates that the Court did not understand the phrase "any felony or larceny"

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account at a bank, and he was authorized to make deposits and (with a co-signature of a fellow employee) to make withdrawals. The company drew a check on another bank payable to the petty cash account, and the defendant altered the amount from $1100 to $11,000 and deposited it in the company's petty cash account. He then drew a check on that account for approximately $11,000, forged the co-signature, and entered the bank and cashed the check therein. The defendant was indicted for (1) entering a national bank with intent to commit larceny, in violation of what is now 18 U.S.C. 2113(a), and (2) taking and carrying away with intent to steal or purloin money in excess of $50, in violation of what is now 18 U.S.C. 2113(b). 120 F.2d at 74. The government conceded that the taking and carrying away charged as offense (2) was the equivalent of the larceny mentioned in the unlawful entry charged in offense (1). *Id.* at 75. The Third Circuit reversed both convictions, concluding that there was no trespassory taking as required for the offense of larceny, but rather a turning over of the money with the fraudulently obtained consent of the bank (*id.* at 75-76)—*i.e.*, false pretenses—an offense that the Third Circuit held was not covered by the statute.

In reaching this result, the court in *Patton* did not examine Congress' intent in enacting the statute, but merely assumed that the statute proscribed only common law larceny. Accordingly, since the defendant's conduct amounted to a theft by false pretenses and not a larceny at common law, the court felt bound to reverse despite its observation that "[i]t may well be that the distinction [drawn by the common law] is artificial and illogical and was evolved by judges in a humane search for legal methods for saving defendants from the consequences following conviction upon a charge of larceny which at the time many of the cases were decided was a capital offense." 120 F.2d at 76. Subsequently, in *United States* v. *Simmons*, *supra*, the Third Circuit concluded that Section 2113(b) does apply to the offense of false pretenses. Thus, *Simmons* while not citing *Patton*, effectively overruled that decision.

in the burglary provision of the statute to encompass entry to commit the fraud or false pretenses offenses proposed in 1934 but not described explicitly in the 1937 Act. The Court twice stated in *Jerome* that the term "larceny" as used in the phrase "any felony or larceny" was defined elsewhere in the statute (318 U.S. at 105, 106)—a reference to the "takes and carries away, with intent to steal or purloin" language now contained in Section 2113(b).[20] If, as the Court indicated, fraud or false pretenses was not covered by the phrase "any felony or larceny" in the burglary provision, then, under the Court's reasoning, fraud or false pretenses likewise could be thought not to be covered by what the Court regarded as the relevant definition of the term "larceny"—the present Section 2113(b), under which petitioner was convicted.

While the language and to some extent the analysis of the decision in *Jerome* thus suggest an interpretation of the statute contrary to the one subsequently adopted by a majority of the courts of appeals to consider the issue and urged by us here, we believe that they are not dispositive on the question of Congress' intent. The issue under consideration here was never briefed or argued in *Jerome*, and the Court's references to the scope of the larceny provision of the statute essentially followed the position taken by the government, which it has since repudiated.[21] In its

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[20] In its brief in *Jerome*, the government took the position that the "larceny" mentioned in the burglary prohibition was defined by what is now Section 2113(b). Brief for the United States at 27, *Jerome* v. *United States* (No. 325, 1942 Term). See also *United States* v. *Patton*, *supra*, 120 F.2d at 75.

[21] The fact that the government long ago took the position that the statute was limited to common law larceny (in a case in which that point was not directly in issue) does not prevent

brief in *Jerome* (at 27), the government contended that the burglary and larceny provisions codified the common law versions of those offenses. Accordingly, the government argued that because burglary at common law prohibited entries with intent to commit any felony, the burglary portion of the statute barred entries into a bank for the purpose of committing any state, as well as any federal, felony. The actual holding in *Jerome*—rejecting the government's argument that the burglary provision of the bank robbery statute embodied the common law definition of burglary—thus is not inconsistent with the position we urge here.

Moreover, the decision in *Jerome* was supported by other considerations that are not implicated in this case. The Court's analysis in *Jerome* started from the premise that Congress generally does not make the application of a federal statute dependent on state law. 318 U.S. at 104. The Court thought it significant that Congress omitted from the burglary provision of the statute any reference to state laws, whereas it had incorporated state laws in other federal penal statutes by specific reference. *Id.* at 106. This led the Court to conclude that Congress had no intention of incorporating all state felonies into the bank burglary statute simply because the offense may have been committed in a federally insured bank, which would federalize many offenses connected only fortuitously to the bank.[22] In addition, the Court was

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the government from urging a different interpretation of the statute in this case. See *Barrett* v. *United States*, 423 U.S. 212, 222 (1976).

[22] The Court stated (318 U.S. at 106):

> The Act extends protection to hundreds of banks located in every state. If state laws are incorporated in § 2(a),

concerned that if the interpretation of the phrase "any felony" were made dependent upon state criminal laws, it would result in disparate application of the statute in different jurisdictions. An offense punishable as a felony under the laws of one state might be classified as a misdemeanor in another state. *Id.* at 106-107.[23]

These concerns are not present in the instant case. The position we espouse would, if accepted, result in a uniform application of Section 2113(b) throughout the United States. Moreover, our interpretation of the statute would not expand federal authority to all state felonies committed in banks but rather would permit prosecution only for those theft offenses that directly implicate the government's interest in protecting against depletion of funds of federally insured financial institutions.

In sum, while it certainly was reasonable for the Court in *Jerome* to assume that Congress would not have expanded federal criminal jurisdiction over all state felonies committed in federal banks without explicitly expressing such an intent, there is no comparable reason to assume that Congress, without explanation, incorporated into the statute obsolete com-

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Congress has gone far toward putting these banks on a basis somewhat equivalent to "lands reserved or acquired for the use of the United States" as described in § 272 of the Criminal Code, 18 U.S.C. § 451. In such a case all violations of penal laws of the state within which the lands are located become federal offenses. Criminal Code § 289, 18 U.S.C. § 468. Such an expansion of federal criminal jurisdiction should hardly be left to implication and conjecture.

[23] The Court noted that while the offense in question—uttering a forged check—was classified as a felony in Vermont, it was labelled a "high misdemeanor" in New Jersey. 318 U.S. at 107.

mon law distinctions that increasingly had been repudiated both in this country and in England, thereby creating an anomalous gap in the protections afforded federally insured banking institutions.

3. Petitioner also argues (Br. 13-14) that his view of the scope of Section 2113(b) is supported by the enactment in 1939 of what is now 18 U.S.C. 1025. Act of Aug. 5, 1939, ch. 434, 53 Stat. 1205. Section 1025 prohibits the obtaining of property by false pretenses upon any waters or vessel within the special maritime and territorial jurisdiction of the United States. This statute was enacted at the request of the Attorney General to reach "card sharping" offenses on the high seas. It is true that the Attorney General's letter proposing the legislation reflects a narrow view of the existing federal enclave larceny statute,[24] which was derived from a 1790 statute[25] and was written in language virtually identical to Section 2113(b). But petitioner's reliance on 18 U.S.C. 1025 is unavailing for a number of reasons.

To begin with, the dangers of relying on post-enactment events are compounded when those events concern an entirely unrelated statute. Section 1025 was a hastily enacted measure, dealing with a matter of little practical import, which went through Congress without debate or hearings. Cf. *United States* v. *Batchelder*, 442 U.S. 114, 120 (1979); *Scarborough* v. *United States*, 431 U.S. 563, 569 (1977). Thus, the statute was not considered in depth by Congress, and its passage does not demonstrate Congress' deliberate intent to maintain the ancient distinctions between common law larceny and false pretenses.

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[24] That statute is currently codified at 18 U.S.C. 661.

[25] Act of Apr. 30, 1790, ch. 9, Section 16, 1 Stat. 116.

Moreover, to the extent that Congress may have focused on the need for the legislation, it is just as reasonable (if not more so) to conclude that Congress was acting out of an abundance of caution, to ensure that there would be no question that federal authorities could prosecute card sharps who operated on vessels in United States waters. Congress may have feared that, because the existing larceny statute derived from a statute enacted in 1790, courts construing that statute would refuse to attribute to the 1790 Congress an intent to embody in the statute an expansive view of larceny that went beyond the common law definition.[26]

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[26] As it happens, the courts in recent years have refused to construe the offense described in 18 U.S.C. 661, the current descendant of the 1790 larceny statute, as being confined to the contours of common law larceny. Under the common law, in order to convict for larceny it was necessary to prove that the thief intended permanently to deprive the owner of his property. See *United States* v. *Northway*, 120 U.S. 327, 335 (1887); K. Sears & H. Weihofen, *May's Law of Crimes*, 346 (4th ed. 1938); 2 W. Burdick, *supra*, at 263; W. LaFave & A. Scott, *supra*, at 637. That requirement, however, has uniformly been rejected by federal courts in their recent interpretations of 18 U.S.C. 661. See *United States* v. *Gristeau*, 611 F.2d 181, 183 (7th Cir. 1979), cert. denied, 447 U.S. 907 (1980); *United States* v. *Maloney*, 607 F.2d 222, 225-226 (9th Cir. 1979); *United States* v. *Henry*, 447 F.2d 283, 285 (3d Cir. 1971). Similarly, the statute has been held to proscribe conduct that would constitute embezzlement, but not larceny, under common law. See *United States* v. *Armata*, 193 F. Supp. 624 (D. Mass. 1961). Accordingly, although the statute—like Section 2113(b)—may be written in terminology borrowed from the common law, the courts generally have refused to read into it the common law's archaic and arbitrary limitations. The fact that the courts have read the language of 18 U.S.C. 661, which is virtually identical to that of Section 2113(b), as reflecting an intent to codify an offense

Furthermore, shortly after Congress enacted Section 1025 it enacted a theft statute relating to investment companies, which, although entitled "Larceny and embezzlement," applied broadly to whoever "steals, unlawfully abstracts, unlawfully and willfully converts * * * or embezzles" money or property. 15 U.S.C. 80a-36. Congress in that enactment equated the term "larceny" with offenses clearly outside the purview of the common law crime. Thus, there is no basis for concluding that Congress deliberately set out in 1937 to codify and preserve outmoded common law distinctions.[27]

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broader in scope than common law larceny strongly supports a similar construction of Section 2113(b). See Note, *supra*, 51 Fordham L. Rev. at 545 n.43, 550 n.79.

[27] Accordingly, Section 1025 is relevant, if at all, only insofar as its enactment reflects the contemporaneous interpretation by the Department of Justice of the scope of the federal larceny statute. That interpretation, however, while ordinarily entitled to some deference (but see *United States* v. *Turley*, *supra*, 352 U.S. at 415 n.14), was in this instance plainly incorrect as a matter of law. It was recognized at the time that

> where the victim [of a card sharp] is fraudulently induced to believe he has lost, when in fact the game is a cheat and he had no chance to win, the obtaining of his money by this means would seem not to be larceny, but obtaining by false pretenses, since he consents to the passing of title to the money. Nevertheless, it has been held that obtaining money by cheating at cards is larceny by trick, because the victim did not intend to give up title to the money unless fairly won.

K. Sears & H. Weihofen, *supra*, at 331-332 (footnotes omitted). See also Note, *Criminal Law-Larceny-Cheating at Cards*, 10 Minn. L. Rev. 253-254 (1926) ("* * * it seems that cheating at cards was larceny at common law as well as by

D. Restricting The Scope Of Section 2113(b) To Common Law Larceny Would Yield Anomalous Results

A construction of Section 2113(b) that limits its scope to larceny as generally understood at common law would perpetuate in this setting the technical and long-discredited distinctions between various types of theft offenses as they existed in years past. See *United States* v. *Shoels*, 685 F.2d 379, 383 (10th Cir. 1982), petition for cert. pending, No. 82-5550; *United States* v. *Simmons*, *supra*, 679 F.2d at 1051 (Adams, J., concurring). See also Note, *supra*, 51 Fordham L. Rev. at 555-559. These distinctions "did not ever correspond to any essential difference in the character of the acts or in their effect upon the victim." *Van Vechten* v. *American Eagle Fire Insurance Co.*, 239 N.Y. 303, 306, 146 N.E. 432, 433 (1925) (Cardozo, J.) (discussing distinction between common law larceny and embezzlement).

One such distinction that may be especially anomalous in the context of bank theft is that between larceny by trick, in which the thief fraudulently induces the owner to part with *possession* of the property, and false pretenses, in which the thief fraudulently induces the owner to part with *title* to the property. The former was regarded as larceny at common law, but the latter was not. If Section 2113(b) were interpreted to embody the offense of larceny as defined at common law, larceny by trick of more than $100 from a federally chartered or insured bank would be a fed-

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statute both in this country and in England"); *Paine* v. *United States*, 7 F.2d 263 (9th Cir. 1925). Thus, the enactment of Section 1025 may support the view that in the late 1930s neither Congress nor the Attorney General was well versed in the technicalities of common law larceny. See note 13, *supra*.

eral felony, yet the obtaining of title to the same amount of money by false pretenses—petitioner's conduct here—would not even be an offense under that section.[28]

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[28] See Note, *supra*, 51 Fordham L. Rev. at 557-558 (footnotes omitted), discussing *United States* v. *Johnson*, 575 F.2d 678 (8th Cir. 1978):

> That such technical distinctions based upon title versus possession no longer prove helpful, and would produce anomalous results, especially when the thefts involve money, is illustrated by the following example. In a recent case, the defendant requested a bank teller to provide a $100 bill in exchange for four twenty-dollar bills and two ten-dollar bills. The defendant then "palmed" the $100 bill for a ten-dollar bill, asserted that the teller had erred, and thereby received another $100 bill. This action apparently fits within the definition of taking by false pretenses; the defendant induced the teller to part with possession and title by means of his false representation. Had the court found that the defendant's actions constituted taking by false pretenses, the defendant could not have been convicted under a narrow definition of section 2113(b). The court, however, labeled his action larceny by trick, which was part of common-law larceny, and therefore included it under a strict interpretation of section 2113(b).
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> In larceny by trick, the artificial legal device of "constructive possession" is used to find the necessary trespassory element. Although the teller voluntarily relinquished actual possession, the bank retained "constructive possession" because the defendant's lie negated the bank's true intent to part with possession. Arguably, the court was in error because the teller intended to pass both title and possession, in which case the theft could not have been larceny by trick, but rather it would have been taking by false pretenses. An assertion that the bank intended to retain title in such a transaction is implausible; the bank hardly expected the same coins or bills to be returned.

Another anomalous distinction is that between false pretenses and larceny by unilateral mistake, where the thief obtains the owner's consent to pass title and possession, not through fraud or misrepresentation, but solely by virtue of the owner's mistake. See, *e.g.*, W. LaFave & A. Scott, *supra*, at 629; Note, *supra*, 51 Fordham L. Rev. at 538 n.8. In a recent case, *United States* v. *Etchison*, No. 81-5246 (4th Cir. Feb. 3, 1983), a bank mistakenly credited to the defendant's account approximately $10,000 deposited by another customer. After realizing the bank's error, the defendant withdrew the money by executing two withdrawal slips. On appeal, the defendant argued that her conduct amounted to false pretenses, not larceny, and therefore that she was wrongfully convicted of violating Section 2113(b), because her execution of the withdrawal slips constituted a misrepresentation on her part that induced the bank to transfer title and possession of the money. In other words, the defendant sought to escape liability by arguing that her actions were more, rather than less, culpable in that she actively induced the transfer of title to and possession of the funds instead of "silently accepting the windfall." *Id.* at 5. Although the court of appeals ultimately rejected the defendant's argument, this case is illustrative of our point that a narrow construction of Section 2113(b) as covering only common law larceny produces absurd results.

Of course, "[t]he end result of a theft, whether or not it constitutes common-law larceny, is the same: The defendant has wrongfully obtained money to the bank's detriment." Note, *supra*, 51 Fordham L. Rev. at 559 (footnote omitted). As this case well illustrates, applying Section 2113(b) only to those nonforcible takings that happen to fit within the maze of arbitrary distinctions that served to define lar-

ceny at common law would thus produce anomalous results that bear no relationship to the culpability of the wrongdoer or to the interstate character of the offense. Indeed, nontrespassory, or consensual, takings from banks are likely to involve large interstate schemes, which pose much more difficult enforcement problems for local prosecutors than does simple larceny. See Note, *supra*, 51 Fordham L. Rev. at 563 & n.159.[29] Furthermore, limiting Section 2113(b) to common law larceny also would leave a gap of uncertain dimensions in federal protection for federally chartered or insured financial institutions.[30]

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[29] The lower courts uniformly have refused to countenance a similar anomaly in construing the bank robbery provision of 18 U.S.C. 2113(a). At common law, a conviction for robbery required proof of, *inter alia*, a taking "from the person or personal presence" of another. K. Sears & H. Weihofen, *supra*, at 296; W. Clark & W. Marshall, *supra*, at 530. Despite the fact that Section 2113(a) tracks the common law formulation by prohibiting the taking of property "from the person or presence of another," three courts of appeals have held that a robber may violate the statute by "constructively" taking from the person or presence of another. Consequently, these courts have rejected arguments that a conviction under Section 2113(a) will not lie where the robbers kidnapped individuals or otherwise threatened harm from a distance, avoiding a direct and confrontational "taking from the presence" of the bank. See *United States* v. *Alessandrello*, 637 F.2d 131, 144-145 (3d Cir. 1980), cert. denied, 451 U.S. 949 (1981); *United States* v. *Hackett*, 623 F.2d 343, 345 (4th Cir. 1980); *Brinkley* v. *United States*, 560 F.2d 871, 873 (8th Cir. 1977). Cf. *United States* v. *Marx*, 485 F.2d 1179, 1182 (10th Cir. 1973).

[30] Embezzlement and misapplication of funds by officers and employees of banks are separately prohibited by 18 U.S.C. 656, and the acquisition of property by fraudulent means would be barred in at least some circumstances by 18 U.S.C. 1014, considered recently by this Court in *Williams* v. *United States*, No. 80-2116 (June 29, 1982). See, *e.g.*, *United*

E. Because The Literal Language Of Section 2113(b) Includes A Taking By False Pretenses, The Rule Of Lenity Does Not Support A Narrow Construction Of The Statute

Petitioner's final contention (Br. 14-16) is that his conviction should be reversed pursuant to the "rule of lenity." He asserts that the coverage of Section 2113(b) is ambiguous and that the statute must therefore be construed strictly in his favor.

As a "guide to statutory construction" (*Callanan* v. *United States*, 364 U.S. 587, 596 (1961)), the rule of lenity is not applicable unless there is a "grievous ambiguity or uncertainty in the language and structure of the Act" (*Huddleston* v. *United States*, 415 U.S. 814, 831 (1974)) such that even "[a]fter [a court has] 'seize[d] everything from which aid can be derived * * *' [it is still] left with an ambiguous statute." *United States* v. *Bass*, 404 U.S. 336, 347 (1971), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). Lenity "only serves as an aid for resolving an ambiguity; it is not to be used to beget one. * * * The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596 (footnote omitted)

Because the ambit of Section 2113(b) can be ascertained with reasonable certainty, the rule of lenity does not support petitioner's claim. As we have demonstrated above, the literal language of the statute applies to petitioner's offense. The conduct for which he was convicted clearly involved the "tak[ing] and

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States v. *Pinto*, 646 F.2d 833, 838 (3d Cir. 1981), cert. denied, No. 81-2088 (Oct. 4, 1982). See also Note, *supra*, 51 Fordham L. Rev. at 559 n.137.

carr[ying] away, with intent to steal or purloin," of more than $10,000 from a federally insured financial institution. The clear words of the statute are not rendered ambiguous by virtue of the fact that in earlier times the phrase "takes and carries away" referred to common law larceny. By the time Section 2113(b) was enacted, larceny had begun to be regarded as a generic term that included all forms of theft. Moreover, the legislative history is at most inconclusive and does not compel a narrow reading of the statute, which would restore the illogical distinctions of the past and lead to the sort of "incongruous results" (H.R. Rep. No. 732, *supra*, at 1) that Congress sought to avoid in enacting the statute. The narrow interpretation proffered by petitioner would thus thwart the statute's purpose of "protect[ing] federally insured banks by expanding the category of proscribed takings beyond robbery to include those committed without the use of force or violence." Note, *supra*, 51 Fordham L. Rev. at 555 (footnote omitted).

In these circumstances, the rule of lenity does not require a narrow interpretation. As the Court observed in *United States* v. *Moore*, 423 U.S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U.S. 18, 25-26 (1948):

> The canon in favor of strict construction [of criminal statutes] is not an inexorable command to override common sense and evident statutory purpose * * *. Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

See also, *e.g.*, *McElroy* v. *United States*, No. 80-6680 (Mar. 23, 1982), slip op. 16-17, quoting *United States* v. *Bramblett*, 348 U.S. 503, 509-510 (1955). Cf. *SEC*

v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 355 (1943), quoting *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1867) (" 'The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings, as the wider popular instead of the more narrow technical one * * *' ").

Considerations of fairness also do not weigh in favor of petitioner's assertion of the rule of lenity. Petitioner unquestionably had "fair warning * * * as to what conduct is criminal and punishable by deprivation of liberty or property." *Huddleston* v. *United States*, *supra*, 415 U.S. at 831. Here, the theft of money from the bank was clearly illegal under state law regardless of the applicability of Section 2113(b). See Fla. Stat. Ann. § 812.021 (West 1976). Moreover, prior to petitioner's commission of the offense, the United States Court of Appeals for the Fifth Circuit had held that Section 2113(b) covered theft by false pretenses. *Thaggard* v. *United States*, 354 F.2d 735 (1965), cert. denied, 383 U.S. 958 (1966). Hence, petitioner was not "forced to speculate, at peril of indictment, whether his conduct [was] prohibited." *Dunn* v. *United States*, 442 U.S. 100, 112 (1979).

Petitioner's reliance (Br. 15) on *Williams* v. *United States*, No. 80-2116 (June 29, 1982), is misplaced. In *Williams*, the Court concluded that the act of depositing several checks that are not supported by sufficient funds is not within the literal terms of 18 U.S.C. 1014 because that course of conduct does not involve the making of a "false statement" that "overvalues" property, as required by the statute. Slip op. 5-6. Because Section 1014 "does not explicitly reach the conduct in question" the Court was "reluctant to base an expansive reading on inferences drawn from

subjective and variable 'understandings.'" Slip op. 7 (footnote omitted). In contrast to the situation in *Williams*, the literal language of Section 2113(b) does reach petitioner's conduct and it is petitioner's narrow interpretation of the statute that would produce anomalous results.[31]

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[31] Petitioner also relies (Br. 15-16) on a statement in *Jerome*, 318 U.S. 104-105, to the effect that federal statutes that duplicate or build upon state law should be narrowly construed. This statement is of little, if any, assistance to petitioner. As already noted (see pages 33-34, *supra*), the Court in *Jerome* was concerned with the problem of lack of uniformity that would obtain under the government's construction of the burglary provision of the bank robbery statute, and with the additional anomaly that, under the government's view, an individual could be haled into federal court for entering a federally insured bank with the intent to commit *any* state felony, including offenses (such as rape or adultery) that had no relationship to the federal interest of protecting banks. Such concerns are not present here.

Moreover, as one commentator has noted (Note, *supra*, 51 Fordham L. Rev. at 560-561 (footnotes omitted)):

> A narrow construction [of Section 2113(b)] * * * assumes that state law regarding nontrespassory offenses is both adequate and enforced. Under this interpretation of the statute, only burglary and common-law larceny were made federal crimes by the 1937 amendment. Yet these two crimes already were covered by state law. Thus, Congress duplicated state laws, presumably because it deemed them inadequate to deal with burglary and larceny from federal banks. When interstate schemes are involved, state laws regarding non-trespassory thefts may also be inadequate. Arguably, Congress intended to include both types of theft in section 2113(b). Furthermore, the danger of diluting state responsibility for local crimes is not present when the financial institutions involved are federally insured; trespassory or non-trespassory thefts committed against them may no longer be purely local in nature.

In short, the rule of lenity does not require a court to disregard the literal language of a statute and adopt instead an interpretation that defies common sense and revives archaic and arbitrary distinctions. The rule of lenity thus provides no basis for reversing petitioner's conviction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 400408 1295

No. 82-5119-CFY
Status: GRANTED

Title: Nelson Bell, Petitioner
v.
United States

Docketed:
July 26, 1982

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Allman, Roy W.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jul 26 1982	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
4	Aug 25 1982		Order extending time to file response to petition until September 22, 1982.
6	Sep 21 1982		Order extending time to file response to petition until October 8, 1982.
7	Oct 8 1982		Order further extending time to file response to petition until October 29, 1982.
8	Nov 9 1982		Brief of United States in support of petitioner filed.
9	Nov 11 1982		DISTRIBUTED. November 24, 1982
11	Nov 29 1982		Petition GRANTED.
			**********
12	Jul 19 1982		Application for stay filed.
13	Jul 20 1982		Response requested by Powell, J. (Due 7/27/82 at noon).
14	Jul 27 1982		Response of the Solicitor General received.
15	Jul 28 1982		Order granting application for stay by Powell, J.
16	Dec 29 1982	G	Motion of petitioner for appointment of counsel filed.
17	Jan 3 1983		DISTRIBUTED. January 7, 1983. (Motion of petitioner for appointment of counsel)
18	Jan 5 1983		Joint appendix filed.
19	Jan 10 1983		Motion for appointment of counsel GRANTED and it is ordered that Roy W. Allman, Esquire, of Fort Lauderdale, Florida, is appointed to serve as counsel for the petitioner in this case.
20	Jan 13 1983		Brief of petitioner Nelson Bell filed.
22	Feb 8 1983		Order extending time to file brief of respondent on the merits until February 28, 1983.
23	Feb 16 1983		Record filed.
24	Feb 16 1983		Certified original record & C.A. proceedings received.
25	Mar 1 1983		Order further extending time to file brief of respondent on the merits until March 14, 1983.
26	Mar 14 1983		Brief of respondent filed.
27	Mar 24 1983		SET FOR ARGUMENT. Monday, April 25, 1983. (3rd case) 1 hour
28	Mar 24 1983		CIRCULATED.
29	Apr 25 1983		ARGUED.